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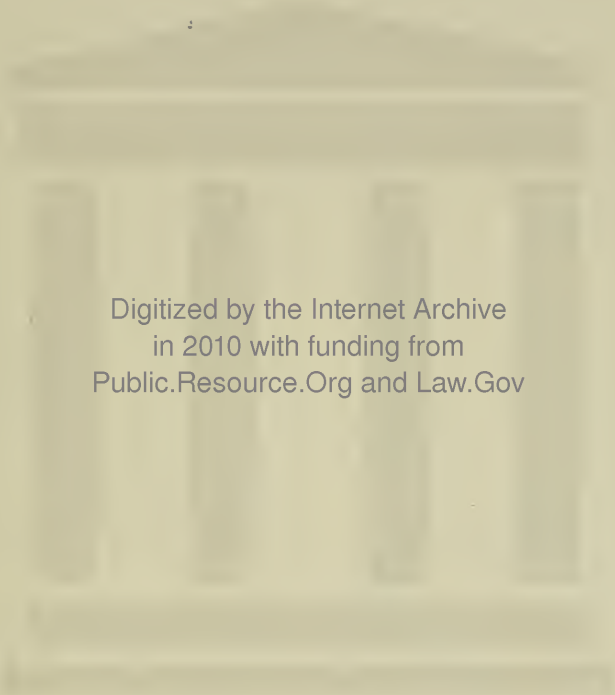
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No. 12784 2673

United States
Court of Appeals
for the Ninth Circuit.

HUNG CHIN CHING,

Appellant,

vs.

FOOK HING TONG, CHONG HING TENN and
KUI HING TENN,

Appellees.

Transcript of Record

Appeal from the Supreme Court for the
Territory of Hawaii

FILED

MAR 27 1951

PAUL J. O'BRIEN,

No. 12784

United States
Court of Appeals
for the Ninth Circuit.

HUNG CHIN CHING,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

SHIRO KASHIWA, ESQ.,

307 Hawaiian Trust Bldg.,
Honolulu, T. H.,

Attorney for appellant.

ROBERTSON, CASTLE & ANTHONY,
(T. M. WADDOUPS, ESQ.),

312 Castle & Cooke Bldg.,
Honolulu, T. H.,

Attorneys for appellees.

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii

In Equity

At Chambers

HUNG CHIN CHING,

Petitioner,

vs.

FOOK HING TONG, CHONG HING TENN and
KUI HING TENN,

Respondents.

BILL TO DECLARE TRUST AND LIEN FOR
AN ACCOUNTING FOR RECEIVER AND
FOR MONEY JUDGMENT

To the Honorable, the Presiding Judge of the Above-
Entitled Court, Sitting at Chambers:

Your Petitioner Hung Chin Ching respectfully
shows:

I.

That he is a citizen of the United States and a
resident of Honolulu, City and County of Honolulu,
Territory of Hawaii.

II.

That Respondents Fook Hing Tong, Chong Hing
Tenn and Kui Hing Tenn are likewise residents of
Honolulu, City and County of Honolulu, Territory
of Hawaii.

III.

That on or about September 13, 1941, Petitioner
and Respondents, Fook Hing Tong and Chong Hing

Tenn, who were friends of long standing, conferred informally with reference to an association and combination of their resources for the purpose of engaging in the restaurant and liquor dispensing business in the City and County of Honolulu, Territory of Hawaii. That thereafter on the same day, Petitioner and Respondent Fook Hing Tong approached Kam H. Lum, proprietor of the "Green Mill," a restaurant and general liquor dispensing establishment located at 1111, 1113 and 1115 Bethel Street, [4*] in Honolulu aforesaid, as to buying said business. That said proprietor expressed a willingness to sell for Thirty Thousand Dollars (\$30,000.00), provided his wife, Elsie Lum, consented.

IV.

That later in the same evening, to wit: September 13, 1941, Petitioner, the two Respondents above named and their brother Respondent Kui Hing Tenn agreed among themselves to buy said business at the price of Thirty Thousand Dollars (\$30,000.00), if it could not be had for less, and to conduct the same as a joint adventure and further agreed and mutually promised to provide said sum as follows: Petitioner promised to contribute Three Thousand Dollars (\$3,000.00) or one-tenth (1/10th) of whatever the purchase price amounted to and Respondents promised to contribute the rest in respective amounts to be agreed upon between themselves. It was, accordingly, understood and agreed by and between the parties that Petitioner would have a one-tenth (1/10th) interest in the business

*Page numbering appearing at foot of page of original Certified Transcript of Record.

and that the Respondents would have a nine-tenth (9/10th) interest. It was further agreed between the parties hereto at the same time that Respondent Chong Hing Tenn was to have complete charge of the finances of the business, that Petitioner was to have complete charge of the sales and personnel, that Chong Hing Tenn and Petitioner, each was to receive a salary of Two Hundred and Fifty Dollars (\$250.00) per month in addition to their respective interests in the business, and that Respondents Fook Hing Tong and Kui Hing Tenn were not to participate personally in the management or conduct of the business.

V.

That thereafter on or about the 14th day of September, 1941, Kam H. Lum, the said proprietor of said business and his wife, Elsie Lum, orally agreed to assign the lease of the premises situated at 1111, 1113 and 1115 Bethel Street, in Honolulu aforesaid and to sell [5] their said business known as the "Green Mill," inclusive of trade name and good-will, to Petitioner and Respondents who in turn agreed to buy the same for the sum of Twenty-five Thousand Dollars (\$25,000.00). That said real property covered under said lease is more particularly described as follows:

That certain parcel of land situated at 1111, 1115 and 1119 Bethel Street, in Honolulu, City and County of Honolulu, Territory of Hawaii, having a frontage of 63 feet on Bethel Street and a depth of approximately 54 feet and containing an approximate area of 3054 square feet more or less.

The said proprietor and his wife, Elsie Lum, voluntarily consented to a trial operation of said business by Petitioner and Respondents until October 1, 1941, at which time the purchase price was to be payable, if the buyers were satisfied with the experiment and with the further understanding that the proceeds of the business collected by Petitioner and Respondents during the trial period were to become their property, if they purchased said business and leasehold.

VI.

That in the negotiations for the purchase of the aforesaid business and leasehold Petitioner exerted a controlling influence because of his long acquaintance and friendship with said proprietor and because of said proprietor's confidence in him.

VII.

That on or about September 16, 1941, Petitioner and Respondent Chong Hing Tenn, on behalf of themselves and Respondents, Fook Hing Tong and Kui Hing Tenn took charge of the aforesaid business and conducted the same under the aforesaid plan for division of management, and under the aforesaid trial arrangement with the said proprietor. That the business prospered beyond the greatest expectations of Petitioner and Respondents, confirming their decision [6] to buy the same.

VIII.

That on or about October 1, 1941, without the knowledge of or notice to Petitioner and pursuant

to and in execution of the aforesaid oral contract between said Kam H. Lum and Elsie Lum on the one hand and Petitioner and Respondents herein on the other, Respondents procured a transfer of said business and the lease of the said premises in their own names and with their own funds.

IX.

That Petitioner was at all times ready, willing and able to contribute his portion of the purchase price of said business. That Petitioner expected and was waiting to be notified when to make his contribution, since the Respondents were to attend to the formal consummation of the deal. That since all dealings between the parties had been informal and characterized by mutual confidence, Petitioner was neither suspicious nor vigilant.

X.

That Petitioner is advised in this connection of the availability to the Seller of the Statute of Frauds as a defense to said oral contract of sale, but that since the Seller did not avail himself of said right before the consummation of said Sale, such defense did not affect the rights of the Petitioner and Respondents thereunder or the equitable interest of the Petitioner in the legal title to the subject matter of the contract which the Respondents acquired in the performance and execution of said contract.

XI.

That on or about October 6, 1941, upon Petition-

er's complaint to Respondent Fook Hing Tong that Respondent Chong Hing Tenn was encroaching upon his, Petitioner's duties as agreed upon, Respondent Fook Hing Tong took occasion to reassure Petitioner of his interest in said business to the extent of Three Thousand Dollars (\$3,000.00). That [7] at the same time, on or about October 6, 1941, Respondent Fook Hing Tong remonstrated with Respondent Chong Hing Tenn as to the matter of Petitioner's said complaint and reminded said Respondent Chong Hing Tenn of Petitioner's part in the joint adventure, referring expressly to the aforesaid oral agreements with respect thereto. That thereafter said Respondent Chong Hing Tenn apparently respected said oral agreements between the parties and accepted Petitioner and his services in accordance therewith.

XII.

That on or about October 11, 1941, Petitioner was informed that articles of partnership among Respondents were about to be prepared to the exclusion of Petitioner. That whereupon Petitioner again conferred with Respondent Fook Hing Tong, and said Respondent again assured Petitioner that the aforesaid oral agreement between the parties would be respected. That upon said assurance, Petitioner continued in the joint management of said business with Respondent Chong Hing Tenn according to the said agreement.

XIII.

That on or about October 20, 1941, Respondents

procured a license to operate said business without notifying Petitioner thereof and omitting Petitioner as Licensee.

XIV.

That on or about October 30, 1941, Respondents entered into articles of partnership and excluded Petitioner from the business.

XV.

That Petitioner received no part of the proceeds of said business which amounted to in excess of Twenty Thousand Dollars (\$20,000.00) during his joint management thereof with Respondent Chong Hing Tenn between September 15, 1941, and October 30, 1941. That said sum was largely profit, since cost of operation was relatively small. That Respondents have continued to operate said [8] business from the time of Petitioner's expulsion to the present time. That they appropriated to their own use not only the trade name "Green Mill," and the good-will of the business both of which were and are of great value, but also appropriated the said leasehold covering said premises. That although their profits have been substantial, they have not accounted to Petitioner for his interest therein or paid him any part thereof.

XVI.

That the matters, the discovery of which is hereinafter prayed, are within the exclusive knowledge of this Respondents, that such matters are not accessible to the Petitioner and are essential to

the prosecution of Petitioner's claim against the Respondents herein asserted.

XVII.

Petitioner is advised and states that the negotiations, agreements, dealings and course of conduct on the part of the parties hereto, set forth above, constituted the parties joint adventurers or partners.

XVIII.

Petitioner is advised and states that in contemplation of equity, Respondents purchased the above-mentioned business and leasehold for the joint use and benefit of themselves and Petitioner and that said leasehold and said business and the profits therefrom in the possession or control of Respondents, in whatever form, are impressed with a trust for the use and benefit of Petitioner to the extent of his interest therein.

XIX.

Petitioner is advised and states that, independently of said trust, he has an equitable lien on said business and leasehold by virtue of the relationship existing and continuing between himself and the Respondents, as aforesaid, to secure his [9] interest in said business and leasehold and the profits therefrom.

XX.

That although Petitioner is ready, willing and able to make a tender to Respondents of the amount of his agreed contribution to the enterprise, the value of his interest therein is greatly in excess

of said amount and Respondents would not disgorge to the extent thereof upon such tender.

XXI.

Petitioner is advised and states that Respondents are jointly and severally liable to him for his interest in said business and leasehold and the profits therefrom prior to his said expulsion and during the subsequent continuance of said business by the Respondents.

XXII.

That this is the first application for a receiver in this cause.

Wherefore, Petitioner prays:

(1) That process issue and be served on the Respondents, as provided by law, requiring them to appear and to plead, answer or demur to Petitioner's petition.

(2) That an accounting be had between Petitioner and Respondents.

(3) That the amount of Respondents' obligation to Petitioner be determined by the Court and that Petitioner have judgment against Respondents jointly and severally for the amount so determined.

(4) That Respondents answer under oath disclosing their respective contributions to the purchase of the business known as "Green Mill" and the leasehold referred to the petition and disclosing further, their respective interest in said business and the proportionate division of profits therefrom among themselves.

(5) That Respondents answer under oath stating the gross income and net income from the aforesaid business for each of the [10] following periods:

(a) Between September 16, 1941, and October 1, 1941.

(b) The month of October, 1941.

(c) Between November 1, 1941, and the present time.

(6) That Respondents answer under oath, stating separately the application of the net income from said business during each of said periods above denominated as a, b and c.

(7) That a lien be declared and fixed, securing Respondents' obligations to Petitioner, on the leasehold held by the Respondents and more particularly described in the petition whether under a new lease or net, and on the net profits from said business since September 16, 1941, to the present time, in the possession or control of Respondents in whatever form they are or may have been converted into.

(8) That the Court adjudge that Respondents hold in trust for Petitioner to the extent of his interest as determined by the Court the aforesaid leasehold whether under a new lease or not and the good-will and trade name of the business, known as the "Green Mill," conducted by Respondents on the premises.

(9) That the Court likewise adjudge that the Respondents hold in trust the net profit accruing

from said business since September 16, 1941, to the present time, in whatever form they may have been converted into, for the use and benefit of the Petitioner to the extent of his interest therein as determined by the Court.

(10) That a receiver be appointed for the "Green Mill," referred to in the petition and for the property more particularly described in the petition on which the business known as "Green Mill," is conducted.

(11) That Petitioner have such further and general relief as he may be entitled in the premises.

/s/ HUNG CHIN CHING. [11]

Territory of Hawaii,
City and County of Honolulu—ss.

Hung Chin Ching, being duly sworn on oath deposes and says: That he has read the foregoing petition, is familiar with its contents and that the same are true.

/s/ HUNG CHIN CHING.

Subscribed and sworn to before me this 3rd day of April, A.D., 1944.

/s/ ETHEL M. IZUMI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1945.

[Endorsed]: Filed April 5, 1944. [12]

[Title of Court and Cause.]

FOURTH AMENDED BILL TO DECLARE
TRUST AND LIEN, FOR AN ACCOUNT-
ING, FOR RECEIVER AND FOR MONEY
JUDGMENT

Comes now Hung Chin Ching, your Petitioner above named, and leave of court having been heretofore had, amends his Bill to Declare a Trust, etc., on file herein, as follows:

I.

That allegations (I-XIV) contained in the original Bill to Declare Trust, etc. on file herein are herewith incorporated by reference and made a part hereof.

II.

That with reference to the matter of tender, it was expressly agreed from the beginning of Petitioner's negotiations with Respondents to the time of his expulsion from business, that is, from September 13, 1941, to October 31, 1941, Respondents were to attend to all financial arrangements and notify Petitioner when to pay his part and that Petitioner was at all times ready, able, and willing to do so.

Petitioner further states that, prompted by the prospect of large profits, Respondents not only failed to notify and permit Petitioner to pay his part, but that they [13] fraudulently circumvented Petitioner and consummated the deal to the exclusion of the Petitioner. Petitioner states, therefore, that

he was excused from paying his part and relieved of any penalty for his failure to do so. Petitioner reiterates that he and Respondents negotiated to settle his claim against Respondents until as late as January, 1943, when Respondent, Fook Hing Tong, promised to compensate Petitioner in his claim in the course of which negotiations, Petitioner's agreed contribution was taken into account. That because of Petitioner's friendship and faith in the said Fook Hing Tong, who was and still is a physician well respected in the community, Petitioner was lulled into a false belief that he, Fook Hing Tong, would convince the remaining Respondents to do the right thing by Petitioner. That in the early part of 1944, Petitioner was finally convinced that Respondents, because of the large profits involved, would not keep their promise and accordingly took legal steps to protect his rights. Respondents are estopped now to set up Petitioner's failure to pay his part or tender the same.

Petitioner further states that after fraudulently preventing Petitioner from paying his part as aforesaid, and after fraudulently acquiring and retaining his corresponding interest in the business because of the unexpected mounting profits, Respondents would not have accepted a tender from Petitioner of his agreed contribution, which was relatively nominal in view of the large proportions to which the business grew.

III.

That allegations XV-XXI contained in said original Bill to Declare a Trust are herewith incor-

porated by reference and made a part hereof. [14]

IV.

Petitioner states with reference to his delay in filing this, his suit, against Respondents herein, that he understood that it was impossible to file the same during the time between December 7, 1941, and March 10, 1943; that Courts of the Territory, having jurisdiction of Petitioner's cause of action herein set forth, were physically closed for the time immediately following December 7, 1941; that on December 19, 1941, said Courts were restrained from exercising jurisdiction over Petitioner's said cause of action by orders of the Military Governor; that on March 10, 1943, said restraint was lifted by order of said Military Governor.

Petitioner further states that he knew the Courts were closed as aforesaid and that he did not know they were opened until March 10, 1943, when they were opened as aforesaid, by the order of the Military Governor. Petitioner has learned, however, since the filing of his suit herein that another order of the Military Governor of January 27, 1942, was promulgated which may have lifted the restraint of said order of December 19, 1941, sufficiently for this Court to entertain his suit. But Petitioner repeats that he knew nothing of said order of January 27, 1942.

Petitioner believes and states that his ignorance of the status of the Courts in the Territory was excusable; that it was shared by the people of the Territory generally, Petitioner points to his said

excusable ignorance and the general confusion of all the people of the Territory on the subject in explanation of why he thought it was impossible to file this suit against Respondents.

Your Petitioner is advised and states that if, nevertheless, he is barred by his delay in bringing his suit, he is barred only to the extent of claiming profits [15] accrued in the business involved subsequent to his expulsion therefrom; that Petitioner's claim to his interest in the proceeds of said business from September 16, 1941, to October 31, 1941, and to his interest in the business itself and the leasehold in question as of the date of Petitioner's expulsion from the business is not affected by Petitioner's said delay in bringing suit.

IV.

That the allegations for relief contained in Paragraph XXII of the said original Bill to Declare a Trust be incorporated herein by reference and made a part hereof.

Dated: Honolulu, T. H., this 4th day of November, A. D., 1947.

/s/ HUNG CHIN CHING,
Petitioner.

Territory of Hawaii,
City and County of Honolulu—ss.

Hung Chin Ching, being duly sworn on oath, deposes and says: That he has read the foregoing

Fourth Amended Bill to Declare Trust and Lien, for an Accounting, for Receiver and for Money Judgment, is familiar with its contents and that the same are true.

/s/ HUNG CHIN CHING.

Subscribed and sworn to before me this 4th day of November, 1947.

/s/ EVA R. HART,

Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1949.

(SEAL)

Filed November 5, 1947.

Returned November 7, 1947. [16]

[Title of Court and Cause.]

ANSWER TO FOURTH AMENDED BILL TO
DECLARE TRUST AND LIEN, FOR AN
ACCOUNTING FOR RECEIVER, AND
FOR MONEY JUDGMENT

Come now Fook Hing Tong, Chong Hing Tenn and Kui Hing Tenn, respondents above named, and answering the Fourth Amended Bill herein allege as follows:

I.

That they admit paragraphs I and II of said amended bill.

II.

That they deny the allegations contained in paragraphs III to XIV, inclusive, of the original bill as incorporated in the fourth amended bill.

III.

That they deny the allegations contained in paragraph II of the fourth amended bill, and allege that there [18] was at no time consummated any agreement for partnership or a partnership between petitioner and respondents; that no tender of any kind was ever made by petitioner for the purchase of any share of the business of respondents; that there were no negotiations towards settlement of any rights of petitioner because petitioner at no time secured or had any right in and to the business of respondents, or the profits therefrom; and that respondents had at all times acted in good faith with petitioner.

IV.

That they deny paragraphs XV to XXI, inclusive, of said original bill as incorporated in said fourth amended bill.

V.

That petitioner is guilty of laches in the premises, and his bill sets forth an alleged agreement which **is violative of the statute of frauds**, and has failed to state a cause of action in equity; and if he has any cause of action, there is a plain, speedy and adequate remedy at law.

Wherefore respondents pray that the fourth

amended bill be dismissed and that they go hence with their costs.

Dated: Honolulu, T. H., June 16th, 1948.

/s/ FOOK HING TONG,

/s/ CHONG HING TENN,

/s/ KUI HING TENN. [19]

Territory of Hawaii,
City and County of Honolulu—ss.

Fook Hing Tong, Chong Hing Tenn and Kui Hing Tenn, being first duly sworn, upon oath depose and say that they are the respondents named in the foregoing answer; that they have read the said answer, know the contents thereof, and that the same is true.

/s/ FOOK HING TONG,

/s/ CHING HING TENN,

/s/ KUI HING TENN.

Subscribed and sworn to before me this 16th day of June, 1948.

/s/ CHARLES Y. AWANA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires: June 30/49.

Filed June 16, 1948. [20]

At Term: Tuesday, July 3, 1945.

Present: Hon. John Albert Matthewman,
Fifth Judge presiding.

[Title of Cause.]

HEARING ON DEMURRER TO
AMENDED BILL

2:29 p.m. The Court having been in session the above matter was duly called.

Mr. Waddoups referred to the minutes in the above matter of the proceedings held before Judge Cristy on May 19, 1944, at which time Judge Cristy sustained a demurrer filed by the respondents.

Upon the showing made the Court inferred that inasmuch as this matter had been before Judge Cristy, that according to the procedure followed in this circuit, the above matter should properly be argued before Judge Cristy, he having heard argument on the prior demurrer.

Counsel in the matter agreed that the demurrer to the amended bill, filed herein, should be heard by the presiding judge of the second division of this court.

Upon the agreement of counsel the Court ruled that the demurrer in question be referred to the second division of this court and the Court further intimated that should the said presiding judge decline to hear the demurrer that this court will hear same.

/s/ GEORGE KAHOIWAI,
Clerk. [21]

At Term: Tuesday, November 13, 1945.

Present: Hon. John Albert Matthewman,
Fifth Judge Presiding.

[Title of Cause.]

MOTION TO SET

Upon the request of Mr. Lee, hearing on the demurrer to the Second Amended Bill was set for Thursday, November 29, 1945, at 10:00 a.m.

/s/ ROGER P. WHITMARSH,
Clerk.

At Term: Thursday, November 29, 1945.

Present: Hon. John Albert Matthewman,
Fifth Judge Presiding.

[Title of Cause.]

MINUTE ORDER

Counsel were informed that hearing on the demurrer to the Second Amended Bill, which was set for this time, cannot be taken up now due to a trial now in progress, L. No. 16653, Territory of Hawaii v. John Waterhouse, et al. (Fisheries case).

This matter was taken off the calendar, subject to being moved on at the earliest possible date.

/s/ ROGER P. WHITMARSH,
Clerk. [22]

Friday, July 19, 1946

The Court convened at 9:30 a.m. at chambers in term.

Present: Hon. Carrick H. Buck,
Judge, Presiding.

[Title of Cause.]

ARGUMENT ON DEMURRER
SET FOR JULY 31, 1946

Upon the request of counsel for the Petitioner and for the Respondent, the Court set Wednesday, July 31, 1946, at 9:30 a.m., for argument on demurrer.

/s/ MERLE UEHLING,
Clerk.

At Chambers: 9:30 o'Clock a.m., Wednesday, July 31, 1946.

Present: Hon. Carrick H. Buck,
First Judge, Presiding.

CONTINUANCE FOR
HEARING ON DEMURRER

Counsel for Respondents stated to the Court that the Original Bill to Declare Trust and Lien for an Accounting for Receiver and for Money Judgment was filed in this Court on the 5th day of April, 1944; that the matter came up for argument before the Hon. A. M. Cristy on Demurrer filed by the

Respondents, at which time the Court sustained the Demurrer; that subsequently an Amended Bill was filed on May 29th, 1944, to which Amended Bill Respondents filed again a Demurrer; this second Demurrer came on for hearing before the Honorable John Albert Matthewman, and said Demurrer was sustained by the Court on a technical question of pleading and did not consider the substance of the Bill itself.

There being no record in the files to show on which grounds the first Demurrer to the original Bill was sustained by the Hon. A. M. Cristy, the Court requested that Counsel submit a written transcript of the Reporter's notes on the hearing on said Demurrer, and continued the hearing on the present Demurrer to Second Amended Bill until moved on.

By Order of the Court:

/s/ O. SEZENEVSKY,
Clerk. [23]

At Terms: Monday, Oct. 6, 1947, 1:30 p.m.

Present: Hon. Willson C. Moore,
Fourth Judge, Presiding.

[Title of Cause.]

MOTION TO SET (DEMURRER)

The Court ordered argument on Demurrer set for
1:30 p.m. Thurssday, October 16, 1947.

By Order of the Court:

/s/ JOSEPH L. COCKETT,
Clerk.

At Term: Thursday, October 16, 1947, 10:06 a.m.

Present: Hon. Martin Pence,
Assigned Judge, Presiding.

[Title of Cause.]

ARGUMENT ON DEMURRER

The Court convened at 10:06. Mr. Waddoups
argued.

At 10:08 the Court asked Mr. Lee to point out
what new positions are pointed out in the second
amended complaint.

Mr. Lee argued.

At 10:10 Mr. Waddoups continued with his argu-
ment.

At 10:14 Mr. Lee argued.

At 10:29 the Court referred to Judge Cristy's
ruling on the original demurrer.

The Court, after hearing argument, sustained the demurrer on the grounds of laches as shown in the second amended bill.

The Court asked Mr. Lee if he wanted to time to answer.

Mr. Lee took an exception to the Court's ruling and informed the Court that he is noting an appeal.

The Court recessed at 10:33.

At 10:51 the Court ordered the following entered in the Minutes: The Court: At the request of Mr. Lee (Mr. Lee being present in Chambers) I phoned Mr. Waddoups, advising him that Mr. Lee had requested twenty days within which to file another amended bill. Mr. Waddoups advised me and by the same phone advised Mr. Lee (three minutes ago) that he had no objections. So it is ordered that the petitioner herein shall have twenty days to file another amended bill.

By Order of the Court:

/s/ JOSEPH L. COCKETT,
Clerk. [24]

Original demurrer was sustained by Judge Cristy, after argument on May 19, 1944, "on the grounds that there is no partnership alleged sufficiently to be enforced as a matter of Equity." (Taken from reporter S. H. Mins' notes.) [25]

At Term: Tuesday, Dec. 2, 1947, 1:37 p.m.

Present: Hon. John E. Parks,
Third Judge, Presiding.

[Title of Cause.]

MOTION TO SET (DEMURRER)

Counsel met with the Court in Chambers at 1:37 p.m.

By agreement, the Court set this cause for argument on demurrer at 9:00 a.m. Friday, December 12, 1947.

By Order of the Court:

/s/ JOSEPH L. COCKETT,
Clerk.

At Term: Friday, Dec. 12, 1947, 9:00 a.m.

Present: Hon. John E. Parks,
Third Judge, Presiding.

[Title of Cause.]

ARGUMENT ON DEMURRER

At 9:00 a.m. Counsel met in Chambers with the Court for argument on Demurrer.

Mr. Waddoups argued.

At 9:02 Mr. Lee argued.

At 9:09 Mr. Waddoups argued, citing 16 Haw.
at 80.

At 9:14 argument by Mr. Lee.

At 9:17 Mr. Waddoups argued, citing 10 Haw. 395; 6 Haw. 160.

At 9:20 argument by Mr. Lee.

At 9:32 argument by Mr. Waddoups.

The Court allowed counsel to file memorandum of authorities, allowing Mr. Lee ten days and Mr. Waddoups five days thereafter.

By Order of the Court:

/s/ JOSEPH L. COCKETT,
Clerk. [26]

At Term: Tuesday, June 15, 1948, at 1:30 p.m.

Present: Hon. W. C. Moore,
Fourth Judge, Presiding.

[Title of Cause.]

SETTING

Mr. Waddoups not present. Mr. Lee, present.

The Court set the matter for hearing on June 21, 1948, at 9:00 a.m. Mr. Waddoups notified.

By Order of Court:

/s/ R. A. LYNN,
Clerk. [27]

At Term: Monday, June 21, 1948, at 9:00 a.m.

Present: Hon. W. C. Moore,
Fourth Judge, Presiding.

Counsel:

HERBERT K. H. LEE, ESQ.,
Counsel for Petitioner.

ROBERTSON, CASTLE & ANTHONY, by
T. M. WADDOUPS, ESQ.,
Counsel for Respondents.

DAVID R. CASTLEMAN, JR.,
Associated with Herbert K. H. Lee,
Counsel for Petitioner.

[Title of Cause.]

TRIAL

Case for Petitioner

9:00 a.m.—Both sides being ready to proceed, Mr. Lee informs the Court as to the basis of the petition.

9:28 a.m.—Fook Hing Tong, M.D., called as an adverse witness, under the Statute.
Direct examination by Mr. Lee.

10:00 a.m.—Court Recessed.

10:10 a.m.—Reconvened.

10:10 a.m.—Direct examination by Mr. Lee continued.

10:25 a.m.—Letter directed to Mr. H. C. Ching, together with envelope, dated October 6, 1941, closing “Aloha Bear,” and copy

of letter directed to "Dear Brother," dated 10/6/41, closing "Your Brother," received and marked Petitioner's Exhibits "A" and "A-1," respectively, for Identification.

10:28 a.m.—Letters described above received in evidence and marked Petitioner's Exhibits "A" and "A-1" in Evidence.

10:30 a.m.—All witnesses who are not parties to the action are ordered to remain without the hearing of the Court.

10:45 a.m.—Cross-examination of Fook Hing Tong by Mr. Waddoups.

10:50 a.m.—Document dated October 14th, 1941, identified by the witness as an Agreement of Copartnership between him and his two brothers for the carrying on of a restaurant and liquor business, received in evidence and marked Respondent's Exhibit I.

10:50 a.m.—Redirect examination by Mr. Lee.

10:52 a.m.—Chong Hing Tenn, called as adverse witness by Mr. Lee.

Direct examination by Mr. Lee.

11:00 a.m.—Court Recessed.

11:10 a.m.—Reconvened.

11:11 a.m.—Direct examination by Mr. Lee continued.

Letter dated October 11, 19, directed to Hiram Fong, Esq., stating that the Liquor Commission had granted the liquor license on October 10, 1941, identified by the witness.

11:18 a.m.—Letter described above received in evidence and marked Petitioner's Exhibit "B" in Evidence. [28]

11:20 a.m.—Bill of Sale dated October 20, 1941, received in evidence and marked Petitioner's Exhibit "C" in Evidence.

Copy of Co-partnership filed with the Territorial Treasurer's Office certifying that on October 1, 1941, the three brothers named herein entered into partnership for the purpose of carrying on a restaurant and liquor business identified by the witness but Not Offered in Evidence.

11:37 a.m.—No cross-examination.

11:38 a.m.—Kui Hing Tenn, called as an adverse witness.

Direct examination by Mr. Lee.

11:40 a.m.—Cross-examination by Mr. Waddoups.

11:50 a.m.—Court Adjourned, and the matter is continued for further hearing to tomorrow, June 22, 1948, at 8:45 a.m.

By Order of Court:

/s/ R. A. LYNN,

Clerk.

At Term: Tuesday, June 22, 1948, at 8:45 a.m.

8:50 a.m.—Mark Y. Murakami, sworn and testified.

Direct examination by Mr. Lee.

Mr. Waddoups objects to questioning the witness concerning the intent of the

petitioner to purchase the Pearl Inn, as being incompetent, irrelevant and immaterial.

Objection is sustained by the Court.

9:00 a.m.—K. C. Wong, owner of the Riverside Grill, sworn and testified.

Direct examination by Mr. Lee.

Mr. Waddoups objects to the line of questioning unless it can be tied in with this case. Testimony is admitted subject to motion to strike.

9:09 a.m.—Cross-examination by Mr. Waddoups.

9:11 a.m.—Redirect examination by Mr. Lee.

9:12 a.m.—Objection by Mr. Waddoups to leading questions is sustained. A further objection by Mr. Waddoups to the leading questions was overruled by the Court, and permitted as merely refreshing the memory of the witness.

9:13 a.m.—Recross-examination by Mr. Waddoups. Motion to Strike all testimony as to Mr. Ching's interest in the Green Mill Cafe, as it is self-serving declaration on the witness' own statement—denied.

9:23 a.m.—Redirect examination by Mr. Lee.

9:25 a.m.—Recross-examination by Mr. Waddoups.

9:27 a.m.—Henry N. Thompson, Executive Secretary of the Liquor Commission, City and County of Honolulu, sworn and testified.

Direct examination by Mr. Lee.

9:37 a.m.—Court Recessed.

9:45 a.m.—Reconvened.

9:45 a.m.—Direct examination of Henry N. Thompson by Mr. Lee continued.

Copy of Statement of Co-Partnership dated October 13, 1941, between the three respondents, received in evidence and marked Petitioner's Exhibit "D."

Copy of Inspector's Report dated October 10, 1948, identified by the witness (report taken from the record of the Liquor Commission) and offered in evidence.

9:47 a.m.—Objection by Mr. Waddoups.

Cross-examination by Mr. Waddoups.

9:50 a.m.—Copy of Report received in evidence and marked Petitioner's Exhibit "E" in Evidence.

9:51 a.m.—Further cross-examination by Mr. Waddoups.

9:54 a.m.—Motion by Mr. Lee to strike answers to the last two questions as incompetent, irrelevant and immaterial, overruled by the Court.

9:55 a.m.—Redirect examination by Mr. Lee.

9:56 a.m.—Lt. Axel E. Nelson, Honolulu Police Department, sworn and testified.

Direct examination by Mr. Lee.

10:00 a.m.—Motion by Mr. Waddoups to strike testimony relative to the liquor business because it had not been shown to relate to this particular business, overruled.

10:01 a.m.—Chong Hing Tenn recalled.

Redirect examination by Mr. Lee.

Mortgage and note on the Green Mill identified by the witness. Witness instructed to produce the cancelled check for \$10,000 paid as his share of the purchase price, if it can be found, at request of Mr. Lee.

10:10 a.m.—Copy of Mortgage and Note dated October 18, 1941, received in evidence and marked Petitioner's Exhibit "F."

10:11 a.m.—Copy of Assignment of Lease, dated October 2, 1941, received in evidence and marked Petitioner's Exhibit "G."

10:11 a.m.—Affidavit of Publication by the owner, Elsie Lum, that she had sold her business as of October 1, 1941, received in evidence and marked Petitioner's Exhibit "H."

10:11 a.m.—Affidavit of Publication of Partnership Notice, received in evidence and marked Petitioner's Exhibit "I."

10:14 a.m.—Court Recessed.

10:23 a.m.—Reconvened.

10:23 a.m.—Chong Hing Tenn resumes the stand. Further redirect examination by Mr. Lee.

Affidavit attached to a file submitted to the witness for identification—identified. Mr. Waddoups objects to its introduction in evidence and the objection was sustained.

- 10:33 a.m.—Recross-examination by Mr. Waddoups.
- 10:34 a.m.—Redirect examination by Mr. Lee.
- 10:43 a.m.—Copy of Bill of Sale Dated October 10, 1941, on file with the Liquor Commission, received in evidence and marked Petitioner's Exhibit "J."
- 10:55 a.m.—Elsie Young Lum, former owner of the Green Mill Cafe, with her husband, sworn and testified.
- 10:55 a.m.—Direct examination by Mr. Lee.
- 11:10 a.m.—Cross-examination by Mr. Waddoups.
- 11:15 a.m.—Redirect examination by Mr. Lee.
- 11:16 a.m.—Court Recessed. [30]
- 11:25 a.m.—Court Reconvened.
- 11:26 a.m.—Lum Kam Hoo, husband of Elsie Young Lum, sworn and testified.
Direct examination by Mr. Lee.
- 11:34 a.m.—Cross-examination by Mr. Waddoups.
- 11:43 a.m.—Redirect examination by Mr. Lee.
- 11:44 a.m.—Recross-examination by Mr. Waddoups.
- 11:45 a.m.—Hung Chin Ching, Petitioner, sworn and testified. (Police Officer, City & County of Honolulu.)
Direct examination by Mr. Lee.
- 11:47 a.m.—Mr. Waddoups moves to strike testimony where it was mentioned that the elderly father of the respondents said he thought the Petitioner should go into partnership with them. Motion Is Granted and Testimony Stricken.

12:00 M. —Court Recessed, to reconvene at 8:45 a.m., tomorrow, June 23, 1948.

By Order of Court:

/s/ R. A. LYNN,
Clerk.

At Term: Wednesday, June 23, 1948, at 8:45 a.m.

8:45 a.m.—Both sides ready to proceed, Hung Chin Ching resumes the witness stand, for continued direct examination.

9:23 a.m.—No cross-examination by Mr. Waddoups.

9:23 a.m.—Court Recessed.

9:35 a.m.—Reconvened.

9:35 a.m.—Continued direct examination of Hung Chin Ching by Mr. Lee.

9:45 a.m.—Cross-examination by Mr. Waddoups.

10:02 a.m.—No redirect examination.

10:05 a.m.—Cross-examination by Mr. Waddoups continued.

10:07 a.m.—Wallace Aoki, Bookkeeper and cashier for Hawaii Meat Company, sworn and testified.

Stipulated by and between counsel that evidence on the accounting be continued until such time as the Court determines whether an accounting should be had, and approved by the Court. Mr. Aoki is excused without prejudice and may be recalled if necessary.

10:09 a.m.—Court Recessed.

10:19 a.m.—Reconvened.

10:20 a.m.—Mr. Waddoups moves to dismiss the Amended Bill and any bills incorporated by reference in it, and that the respondents may go hence with their costs, on the grounds that there has not been given to the Court that type of action which is contemplated in the Equity jurisprudence; cites the case of *Lucas vs. American Hawaiian Engineering & Construction Company*, 16 Haw. 80, Page 87; *Magoon vs. Engineering Company*, 22 Haw. 3271 and 25 Haw. 194. Further, that the petitioner is guilty of laches.

10:38 a.m.—Argument by Mr. Lee, citing the Hawaii case of *E. E. Black vs. Lord and McCandless*, 13 Haw. 507, *Blaisdell vs. Burns*; reads from 2 Haw. 436, and further cites 136 Pac. 2, Page 651; 11 A.L.R., 432-434 concerning contribution; 48 A.L.R. 1058, 63 A.L.R., 9091 and concerning laches—*American Jurisprudence*, Sections 333, 334 and [31] 335.

11:20 a.m.—Court Recessed.

11:40 a.m.—Reconvened.

11:40 a.m.—Mr. Waddoups' answering argument.

11:45 a.m.—By the Court: This being a Motion to Dismiss on the grounds that there is no proof to substantiate the allegations of

the petitioner, therefore the petitioner is not entitled to any relief at this time. The Court in this situation has to look on the evidence in its best light, and with this end in view this Court at this time will overrule the Motion to Dismiss.

11:50 a.m.—Court Recessed to reconvene tomorrow, Thursday, June 24, 1948, at 8:45 a.m.

By Order of Court:

/s/ R. A. LYNN,
Clerk.

At Term: Tuesday, June 24, 1948, at 8:45 a.m.

Case for Respondents

8:45 a.m.—Hiram L. Fong, sworn and testified.
Direct examination by Mr. Waddoups.

8:52 a.m.—Mr. Lee is permitted to question the witness briefly.

8:54 a.m.—Continued direct examination by Mr. Waddoups.

8:59 a.m.—Cross-examination by Mr. Lee.

9:17 a.m.—David P. Soares, Deputy High Sheriff, Territory of Hawaii, sworn and testified.

Direct examination by Mr. Waddoups, as to service of subpoena on Arthur Pai.

9:19 a.m.—Dr. Fook Hink Tong, Respondent, sworn and testified.

Direct examination by Mr. Waddoups.

- 9:29 a.m.—Cross-examination by Mr. Lee.
- 9:46 a.m.—Court recessed.
- 10:00 a.m.—Court reconvened.
- 10:00 a.m.—Continued cross-examination by Mr. Lee.
- 10:04 a.m.—Mr. Castleman carries on cross-examination of the witness for Mr. Lee; no objection by opposing counsel.
- 10:25 a.m.—Kui Hing Tenn, Respondent, sworn and testified.
- 10:30 a.m.—Direct examination by Mr. Waddoups.
- 10:33 a.m.—Bank statement of Bank of Hawaii, dated October 10, 1941, showing account of the witness, received and marked Respondent's Exhibit II for Identification.
- 10:34 a.m.—Bank statement received in evidence and marked Respondent's Exhibit II in Evidence.
- 10:35 a.m.—Check on the Bank of Hawaii, No. 1989, in the sum of \$15,000.00 (certified) to Kam Hoo Lum, received in evidence and marked Respondent's Exhibit III.
- 10:36 a.m.—Check on the Bank of Hawaii, No. 643, in the sum of \$10,000.00, to Kam Hu Lum, received in evidence and marked Respondent's Exhibit IV in Evidence.
- 10:44 a.m.—Mr. Waddoups requests a continuance for the purpose of completing evidence, and makes offer of proof now—
That some time after the "blitz," at a time when the bars were closed, the petitioner, Ching, stated to Arthur Pai

that it was a lucky thing he had not put any money in the Green Mill; and asks the case be continued until Mr. Pai can be produced.

The Court ordered a new subpoena be issued for Mr. Pai, returnable at 8:30 a.m. the first secular day after service, and that the Sheriff to whom it is given report to counsel in town, who will notify Mr. Castleman at Wahiawa. As soon as the witness is served, a date for further hearing will be agreed upon by counsel.

10:50 a.m.—Court Recessed.

By Order of Court:

/s/ R. A. LYNN,
Clerk.

At Term: Saturday, June 26, 1949, at 8:30 a.m.

8:34 a.m.—Arthur Pai was sworn and testified.

Direct examination by Mr. Waddoups.

8:38 a.m.—Cross-examination by Mr. Lee.

8:44 a.m.—Mr. Waddoups interposes a question.

8:44 a.m.—Cross-examination by Mr. Lee continued.

8:46 a.m.—Redirect examination by Mr. Waddoups.

9:00 a.m.—Court Recessed to reconvene on Friday, July 2, 1948, at 9:00 a.m., for further trial of this case.

By Order of Court:

/s/ R. A. LYNN,
Clerk. [33]

At Term: Friday, July 2, 1948, at 9:00 a.m.

9:02 a.m.—Chong Hing Tenn, sworn previously as a witness for the Petitioner, testified. Direct examination by Mr. Waddoups. Objection by Mr. Lee to testimony of the witness concerning a conversation alleged to have been had between Chong Hing Tenn and Arthur Pai in an effort to impeach the former witness, Pai, is sustained by the Court.

It was Stipulated by and between counsel that the Fair on Maui in 1941 was held on October 9th, 10th and 11th.

9:14 a.m.—Respondents Rest.

Hung Chin Ching recalled.

9:14 a.m.—Redirect examination by Mr. Lee.

9:18 a.m.—Petitioner Rests.

9:18 a.m.—Argument by Mr. Lee.

9:40 a.m.—Argument by Mr. Castleman who cites various authorities mentioned in his brief on file in this case—

Menefee v. Oxnam, Cal. 183 P. 379.

Latimer v. Piper, 261 Mich. 123 and

Turtur v. Isserman, 128 Atlantic 151.

Linn v. Weber, 134 Pac. 461.

McDonough v. Saunders, Ala. 78 So. 160.

An Iowa case in 255 N. W.

Wharff case in 2 Haw. 436.

Miller vs. Walser, 181 Pac. 437.

In re Nelson, 26 Haw. (Laches).

In re Ishida, 34 Haw. 363.

Levy vs. Love.

Houghtailing vs. Dela Nux, 25 Haw. 438.

Hearst vs. Kukui, 25 Haw.

Bertelmann vs. Lucas, a Hawaiian case,
and Ulrich vs. Hite.

10:08 a.m.—Court Recessed.

10:20 a.m.—Court Reconvened.

10:20 a.m.—Argument by Mr. Waddoups; also cites
Houghtailing vs. Dela Nux, 25 Haw.
438. [34]

10:28 a.m.—Answering argument by Mr. Lee.

Mr. Lee asks permission to proceed
further on the matter of an Accounting.

After summing up the evidence, the Court ruled
in favor of the Petitioner and ordered an Account-
ing.

Mr. Waddoups is allowed the privilege of taking
an interlocutory appeal to the Supreme Court on
the findings.

By Order of Court:

/s/ R. A. LYNN,
Clerk.

Court Adjourned at 11:00 a.m.

At Term: Saturday, July 24, 1948, at 9:00 a.m.

MINUTE ORDER

The Court this date set aside its order for an accounting made on July 2, 1948, and will take the case under advisement.

By Order of Court:

/s/ R. A. LYNN,
Clerk. [35]

[Title of Court and Cause.]

DECISION

This is a suit in equity seeking to have an interest in a co-partnership held in trust for petitioner; to have an accounting of the business to establish the amount of petitioner's alleged interest; to have a money judgment against the respondents for the amount shown by an accounting to be due him; and that a receiver be appointed to carry on the business.

The petitioner was a sergeant of police in Honolulu during the entire period covered by these proceedings.

Respondent Fook Hing Tong is a physician and surgeon practicing his profession in Honolulu who was very friendly with petitioner for a period of two years prior to the purchase of the business involved in this suit.

Respondent Chong Hing Tenn, a brother of Fook

Hing Tong, is a former resident of Kohala, Hawaii, where he [36] operated a store and liquor business prior to 1941 and was interested in getting into the liquor business in Honolulu during 1940 and 1941.

Respondent Kui Hing Tenn is the third brother interested in the business.

During the latter part of 1940 and the year 1941 Chong Hing Tenn was interested in getting into the liquor business in Honolulu and endeavored to have his brother Dr. Tong aid him in financing the purchase of various establishments. From the summer of 1941 until the Green Mill was purchased by the Tenn brothers, Dr. Tong visited various liquor establishments with his good friend Ching (petitioner) in an effort to find one for sale. About the first of September it was learned that the male owner of the Green Mill, because of ill health, desired to sell.

A conference was held one evening at the home of the father of the Tenn brothers at which the three respondent brothers, the father and Ching were present when the purchase of the Green Mill was discussed. The expected price was \$30,000.00. Upon learning that Ching was acquainted with Lum, co-owner, with his wife, of the Green Mill, they all went to Lum's home. After some discussion Lum agreed to sell for \$25,000.00 plus the inventory and the Tenn brothers and Ching agreed to buy the Green Mill. A tender of a \$200.00 check to bind the agreement was refused by Lum who advised the parties that his attorney, Hiram Fong, would take

care of all the details of [37] the sale and transfer of the business, which included an assignment of a lease, the transfer of the liquor license, and an inventory of the stock on hand. Lum further agreed to allow the prospective purchasers to operate the Green Mill while the transfer was being made.

At this time it was agreed that Ching's share would be \$3,000.00 and the balance would be paid by the Tenn brothers. Dr. Tong put up \$10,000.00 in cash which he turned over to his brother Kui Hing, as he was then in the Army and stationed on Maui.

Ching had no ready available cash, so had to raise it himself. He endeavored to have Dr. Tong finance him without avail. He asserts that he made arrangements with one K. C. Wong, the owner and operator of the Riverside Grill (a restaurant and bar) to loan him, when needed, the sum of \$2,000.00 without any security, and the balance was to be raised by putting an additional mortgage on his house.

It was agreed between the parties that upon the formation of the partnership that the active members would be Ching, who would be in charge of the personnel and management of the business, and Chong Hing Tong who would take care of the finances and any legal matters. Each was to draw a salary of \$250.00 a month in addition to their share in the business.

Under this arrangement they took over the operation of the Green Mill, with the aid and supervision of Mr. and Mrs. Lum, the former owners, dur-

ing the period while Hiram Fong was completing the transfer of lease and liquor license and inventorying the stock. [38]

The sale of the Green Mill was closed about October 20, 1941, but was retroactive as of October 1, 1941. From about the middle of September until about October 20, 1941, the Green Mill was operated by Ching and Chong Hing. Up to October 1st, it was a trial period under the supervision of the Lums and after that for the new purchasers. During this period some friction arose between Ching and Chong Hing which resulted in a letter being written by Ching to Dr. Tong. In response thereto Dr. Tong wrote to both Ching and Chong Hing on October 6, 1941. The letter to Chong Hing was a direction to allow Ching to manage the Green Mill and look after Dr. Tong's interest or to buy out Dr. Tong's interest. The letter to Ching reaffirmed the oral arrangement between the Tenn Brothers and Ching to be partners in the business, and advised Ching that he was to have three shares "that is if you get the dong by then." It also asked Ching to take care of Dr. Tong's interest in the business.

From the testimony, the letter of October 6, 1941, and the bank statement of Kui Hing Tenn, it is not clear how much money Dr. Tong put up in the first instance to buy the business. But, it does appear from the testimony that at the time of forming the partnership the interests of the respondents were Dr. Fook Hing Tong \$10,000.00, Chong Hing Tenn \$10,000.00 and Kui Hing Tenn \$5,000.00.

By the uncontroverted testimony the petitioner never tendered the amount of this subscription (\$3,000.00) to any of the present respondents. He asserts this failure is: no demand was made on him to put up his \$3,000.00 by [39] Chong Hing Tenn who was to take care of the finances. Petitioner admittedly did not get along too well with Chong Hing Tenn and complained to Dr. Tong and was advised that he would be in the partnership "that is if you get the dong (money) by then." With this warning he made no tender of his share. Then upon learning he was not included in the partnership he borrowed \$75.00 and went to Maui and, according to Dr. Tong, again asked him (the Doctor) to finance him. Petitioner's story of lack of demand coupled with a promise of an unsecured loan from a competitor to pay his share seems rather weak as against a direct demand and warning by Dr. Tong to get the money, and never discussing the matter of putting up his \$3,000.00 when he knew at the time that the necessary transfers were being made by Attorney Fong. After making his trip to Maui in October, 1941, he did not tender his \$3,000.00 on the excuse that he did not want to be involved in a lawsuit. Then it is significant that during the several months the bars were closed in Honolulu following Dec. 7, 1941 (Pearl Harbor attack), he did nothing. It was not until late in 1943, when every bar in town had **a doorman or bouncer to keep the prospective customers from overcrowding the bars**, and all bars were and had been for over a year doing a land

office business, that petitioner sought to get his original agreed share in the business.

On October 1, 1941, petitioner unquestionably had a right upon putting up \$3,000.00 to get a share in the business. Means were then available to him to learn and be aware of what was going on relative to the proposed [40] partnership. He could have checked on the transfer of the liquor license, the assignment of the lease through either Fong or Lum and the Gross Income License at the Tax Office and acted accordingly. But he did nothing. Equity helps the vigilant, not those who sleep on their rights.

The agreement upon which this action is based, was one to form a partnership. It was never formed principally because the petitioner could not, would not or did not put up his share of the investment in the proposed venture, and the Court can see no equity in his present request to share in the profits of the industry and financed enterprise of the respondents.

A decree in favor of the respondents and against the petitioner, together with costs, will be signed on presentation.

Dated: Honolulu, T. H., this 25th day of August, 1948.

/s/ WILSON C. MOORE,

Judge of the Above-Entitled
Court.

Filed August 25, 1948. [41]

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii

In Equity

At Chambers

HUNG CHIN CHING,

Petitioner,

vs.

FOOK HING TONG, CHONG HING TENN and
KUI HING TENN,

Respondents.

DECREE

The above-entitled cause having come on duly to be heard, and Petitioner being present at all hearings and represented by Herbert K. H. Lee, Esquire, and David R. Castleman, Jr., Esquire, attorneys; and Respondents having been present at all hearings and represented by Thomas M. Waddoups, of the law firm of Robertson, Castle & Anthony; and evidence having been adduced and both sides having rested; the Court, on August 25, 1948, filed its decision herein, which said decision sets forth in full the reasons for the Court's findings herein;

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed that Petitioner have nothing by his action; that the Bill to Declare Trust and Lien, for an Accounting, for Receiver, and for Money Judgment, be and the same is hereby [42] dismissed:

and Respondents may go hence with costs accrued herein.

Dated: Honolulu, T. H., September 2, 1948.

/s/ WILLSON C. MOORE,
Judge of the Above-Entitled
Court.

Approved as to form:

/s/ HERBERT K. H. LEE,
Attorney for Petitioner.

Filed September 2, 1948. [43]

[Title of Court and Cause.]

APPEAL AND NOTICE OF APPEAL

Comes now Hung Chin Ching, Petitioner, and does hereby appeal and does hereby give notice of appeal to the Supreme Court of the Territory of Hawaii, from the Decree made and entered in the above-entitled Court and cause by the Honorable Willson C. Moore, Judge of said Court, on September 2, 1948.

Dated at Honolulu, T. H., this 9 day of September, A. D., 1948.

HUNG CHIN CHING,
Petitioner,

By HERBERT K. H. LEE and
DAVID R. CASTLEMAN, JR.

By /s/ HERBERT K. H. LEE.

Filed September 9, 1948. [44]

In the Supreme Court of the Territory of Hawaii

No. 2729

HUNG CHIN CHING,

Appellant,

vs.

FOOK HING TONG, CHONG HING TENN and
KUI HING TENN,

Appellees.

APPEAL FROM DECREE OF THE FIRST
JUDICIAL CIRCUIT AT CHAMBERS, IN
EQUITY

AMENDMENT TO BRIEF

The Brief heretofore filed herein by Appellant is amended by incorporating therein, immediately following the conclusion of that part thereof entitled "Introduction," the following:

Errors Relied On

(1) The Court below erred in holding that the "agreement upon which this action is based was one to form a partnership" since all the evidence showed that it was an agreement of joint venture between the parties stipulating their respective interests in a business which was actually acquired.

(2) The lower Court erred in finding that the agreement was never consummated as planned because of Petitioner's failure to put up his share of the money, instead of holding (as the Trial

Judge did in his first opinion) that “at the time this partnership was actually consummated, it really amounted to a squeeze out of Ching.”

(3) The lower Court erred in finding that Petitioner’s share of the money was due October 1, 1941, in that there is not a scintilla of evidence in the record that October 1st or any other specific date was fixed by the parties as the deadline for payment of their shares.

(4) The lower Court erred in finding that Petitioner was [45] guilty of any lack of vigilance in failing to find out on October 1, 1941, that he had been left out of the formal partnership, since all the evidence shows that no means were readily available to him to discover that fact until at least a week after October 1st, and since, as a matter of law, he was not obliged to be suspicious of his associates.

(5) The lower Court erred in suggesting that Petitioner was guilty of laches in pursuing his legal remedy, and in failing to find (as the Trial Judge did in his first opinion) that, under all the circumstances, the doctrine of laches did not apply in this case.

(6) The lower Court erred in ruling that there is no equity in Petitioner’s request to share in the “industry and financed enterprise of Respondents,” since there is not a scintilla of evidence showing that Respondents expended any industry (except in the case of Chong Hing Tenn who was paid an

adequate salary therefor) or had any further financial dealings with the Green Mill except to collect profits.

(7) The lower Court erred in failing to decree an accounting (as it did in its first decision) and in failing to adjudge that Petitioner owns and has owned since October, 1941, a 3/25ths interest in the Green Mill.

Respectfully submitted,

/s/ HERBERT K. H. LEE,

/s/ DAVID R. CASTLEMAN, JR.,
Attorneys for Appellant.

Filed March 9, 1950. [46]

[Title of Court and Cause.]

OPINION OF SUPREME COURT

Appeal and Error—Equity—Findings of Fact—
Weight on Review.

Upon appeal from a final decree in equity, while the findings of fact by a trial judge are not conclusive upon review, yet, where such findings depend upon the credibility of witnesses and the weight of conflicting testimony, such findings are entitled to great weight.

Joint Purchasers—Oral Agreement—Non-Performance—Default.

Where, by oral agreement between prospective joint purchasers of a business enterprise the contributive share of each is fixed and determined, and one of the parties fails to perform, the remaining parties may, in the absence of a showing of fraud or bad faith, consummate the purchase excluding the defaulting party. [47]

Equity—Evidence Requisite to Establish Fraud or Bad Faith.

Equitable relief premised upon fraud or bad faith will be denied in the absence of an affirmative showing thereof practiced upon the party seeking redress. [48]

Opinion of the Court

By Towse, J.:

This is an appeal from a decree dismissing a bill to declare a trust and lien, for an accounting, for receivership and for a money judgment. The original bill is supplemented by three amended bills, which, together with the original bill, were the subjects of demurrer, each respective demurrer being overruled.

The material allegations of the bill as amended, upon which the petitioner seeks relief and which are necessary to the disposition of this appeal, aver that on or about September 13, 1941, the petitioner and respondents Fook Hing Tong and Chong Hing

Tenn conferred informally with reference to an association and combination of their resources for the purpose of thereafter engaging in the restaurant and liquor dispensing business in Honolulu; that on the same day, the petitioner and respondent Fook Hing Tong approached one Tam H. Lum, proprietor of the Green Mill, a restaurant and liquor dispensing establishment upon the subject of purchasing the said business. Lum expressed a willingness to dispose of the business for the sum of \$30,000, conditioned upon his wife's approval; that during the evening of the same day, the petitioner and the respondents agreed to purchase the business for a maximum purchase price of \$30,000 and to conduct the same as a joint adventure, each further agreeing and mutually promising to contribute toward the purchase price their respective contributive shares in the following proportions: Petitioner, \$3,000, or one-tenth of the purchase price; the respondents, the remainder of the purchase price in amounts and share interests to be agreed [49] upon among themselves. The allocation of shares upon consummation of the purchase was understood and agreed by and between all party purchasers, to be that the petitioner was to contribute and receive a one-tenth interest, or share in the business, and the respondents the remaining nine-tenths interest or nine shares. It was simultaneously agreed between all party purchasers that the respondent Chong Hing Tenn was to assume and exercise exclusive control of the finances of the business; that petitioner was to assume and exercise exclusive con-

trol of the sale and personnel of the business, and that each was to receive a salary of \$250 per month therefor in addition to his respective interest in the enterprise. The remaining respondents were excluded from personal participation in the management or conduct of the business. On the following day Lum and his wife orally agreed with the purchasers to sell the business including the trade name and good will thereof, and to assign the lease of the business premises to them. A purchase price of \$25,000 was agreed upon. In addition to the foregoing oral agreement, the sellers voluntarily agreed and consented to a trial operation of the business by the purchasers until October 1, 1941, upon which date the purchase price was to be payable if the purchasers were satisfied with the experiment. The ad interim proceeds of the business during the trial period were to become realizations of the purchasers in the event the sale was consummated. Pursuant to the agreement between the parties to assume active operating control of the business on behalf of all of the purchasers under the trial operation arrangement with the sellers between the period [50] September 16, 1941, the date of commencement of the trial operation period, and October 1, 1941, the termination thereof, the business prospered and the purchasers elected to exercise their right of purchase. On or about October 1, 1941, without the knowledge of or notice to the petitioner and pursuant to and in execution of the oral contract to purchase, the respondents procured transfers of the business and the lease

of the business premises into their names with their own funds to the exclusion of the petitioner, who was at all times ready, willing and able to contribute his agreed share of the purchase price, and who expected and was waiting for notification as to when his contribution should be made since the respondents were to attend to the formal consummation of the purchase. Since all dealings between the party purchasers prior thereto had been informal and characterized by mutual confidence, the petitioner as a result was neither suspicious, nor did he exercise vigilance in respect of the formal consummation. On or about October 6, 1941, petitioner complained to respondent Fook Hing Tong that Chong Hing Tenn who, together with the petitioner, had been actively operating the business, was interfering with his exclusive operational duties as agreed upon. The respondent Fook Hing Tong thereupon reassured the petitioner of his interest in the business to the extent of \$3,000 and remonstrated with the respondent Chong Hing Tenn regarding petitioner's exclusive managerial duties and of his interest in the joint adventure. On or about October 11, 1941, the petitioner was informed that articles of copartnership between the respondents were about to be prepared to the exclusion of the petitioner. The petitioner conferred with the respondent [51] Fook Hing Tong who again assured petitioner that the oral agreement as agreed upon between the party purchasers would be respected. On or about October 20, 1941, the respondents procured a transfer of the retail liquor license

of the said business to themselves without notification to the petitioner and omitting him as a licensee. On or about October 30, 1941, the respondents executed articles of copartnership excluding the petitioner. The respondents have operated the said business from that date to the filing of the bill herein to the exclusion of the petitioner, thereby appropriating to their own use the business, trade name, good will, and assigned lease, and failing to account to him for his interest therein or profits due him, though the events and acts of the parties heretofore set forth constituted the parties, as alleged in the bill, "joint adventurers or partners."

The bill as amended prays for an accounting between petitioner and the respondents; that the amount of respondents' obligation to the petitioner be determined, and that petitioner have judgment against the respondents jointly and severally for the amount thereof; that respondents, by way of answer under oath, disclose their respective contributions to the purchase price of the business and the leasehold and their respective interests in the said business, together with the proportionate division of profits derived therefrom as among themselves; that respondents, by way of answer under oath, disclose the gross and net incomes from the business from September 16, 1941, to the date of filing of the bill, together with the application of the net income during that period as among themselves; that a lien be declared securing respondents' obligations to the petitioner upon the leasehold and upon the net profits of the business during the aforementioned

period; that the respondents be adjudged as trustees for and on behalf of petitioner to the extent of his interest as determined, together with the lease upon the business premises, the good will, trade name, and net profits accruing from the business since September 16, 1941, to the date of filing of the bill for the use and benefit of petitioner, and that a receiver be appointed for the business and the property constituting the same.

On June 16, 1948, four years subsequent to the filing of the original bill, by way of answer to the bill as amended, the respondents denied generally the material allegations thereof. They further specifically denied and alleged that they at no time consummated any agreement for a copartnership between the petitioner and themselves; that no tender of any kind or amount was ever made by the petitioner for the purchase of any share of the business, and that the respondents had at all times acted in good faith in respect of the petitioner.

From the evidence adduced below the following facts, pertinent to this appeal, were found by the trial judge:

The petitioner was a sergeant of police in the Honolulu Police Department during the entire period covered in the proceedings; that the respondents are brothers and the petitioner was very friendly with the respondent Fook Hing Tong for a period of two years prior to the consummation of the purchase of the business; that during the latter part of 1940 and the year 1941, one of the respondent-brothers, Chong Hing Tenn, was interested in

engaging in the [53] liquor business and solicited the assistance of his brother Fook Hing Tong to aid him in financing the purchase thereof; that commencing with the summer of 1941 until the consummation of the purchase of the Green Mill by the respondents, the respondent Fook Hing Tong together with the petitioner, visited various liquor establishments in an endeavor to locate one for sale. On or about September 16, 1941, they learned that the Green Mill was for sale. A conference was had at the home of the respondents' father attended by the respondents, their father and the petitioner. The purchase of the Green Mill was discussed. It was orally agreed by and between the respondents and the petitioner that the petitioner's contributive share would be \$3,000. The remainder of the purchase price was to be contributed by the respondent-brothers. Upon being advised that the petitioner was acquainted with the owner of the Green Mill, they proceeded to his home. After a discussion, a sales price of \$25,000, in addition to the inventory, was agreed upon, the respondents and the petitioner orally agreeing to purchase the business for that amount. The seller advised the parties that his attorney would attend to all details of the sale and the transfer of the business, including an assignment of the lease of the business premises, the transfer of the liquor license and an inventory of the stock on hand. The seller further agreed to permit the prospective purchasers to operate the business during the transfer period.

The petitioner had no currently available funds. He endeavored to have Fook Hing Tong finance him without success. By way of available assets, petitioner testified [54] that he had effected arrangements for a loan, when needed, in the sum of \$2,000 without security, further asserting that the balance of \$1,000 was available and could be raised by an additional mortgage charge upon his home. The court found that the respective interests, which the respondents did in fact contribute, were Fook Hing Tong and Chong Hing Tenn, the sum of \$10,000 each, and Kui Hing Tenn, the sum of \$5,000.

The trial judge further found that it had been agreed by and between the petitioner and respondents that the petitioner was to be in charge of the management and personnel of the business, and the respondent Chong Hing Tenn in charge of the finances and legal matters; each to draw a salary of \$250 per month in addition to his respective share in the business. Under this management arrangement, the party purchasers took over the operation of the Green Mill with the aid and under the supervision of the sellers during the period in which the completion of the transfer of the lease and the liquor license were being effected and an inventory of the stock was being completed. The consummation of the sale of the business was found to be on or about October 20, 1941, retroactive to October 1, 1941; and that from on or about September 15, 1941, to October 20, 1941, the business

was operated under the dual management of the petitioner and respondent Chong Hing Tenn. Differences arose between the petitioner and the respondent Chong Hing Tenn during the trial management period. The petitioner made letter protest to the respondent Fook Hing Tong citing the interference of his brother, Chong Hing Tenn, in certain [55] operational phases of the business. The respondent Fook Hing Tong then being on the island of Maui, replied to both the petitioner and respondent Chong Hing Tenn on October 6, 1941, and expressly reaffirmed the oral agreement among the party purchasers and reassured the petitioner that he was to share in the business to the extent of a three-share interest upon the express condition that he make contribution of the amount representing his three-share interest as agreed upon.

Evidence of the petitioner's failure to tender this amount is uncontradicted. He asserted the two-fold reason for his failure to do so; first, that no demand was made upon him; second, the letter assurance and reaffirmance of the respondent Fook Hing Tong that he would be permitted to participate in the purchase upon the condition that he tender his contributive share.

During the period in which the transfers were being consummated by the attorney for the sellers, the petitioner asserts that his exclusion in the proposed partnership came to his attention for the first time. He thereupon borrowed the sum of \$75 and proceeded to Maui to confer with the respondent Fook Hing Tong where he again endeavored to

have him finance the contribution of his three-share interest. Fook Hing Tong refused. On April 5, 1944, approximately two and one-half years after the formation of the copartnership between the respondents, the original bill herein was filed.

Upon examination of the transcript of evidence, this court finds the testimony adduced in the court below upon all material issues patently saturated with evasive, contradictory and conflicting statements. The trial judge [56] converted this testimony into the findings of fact hereinabove set forth. Upon the entire record now before us, this court in the circumstances, resorts to and adopts the established rule that issues of fact, the determination of which by the trial court is dependent solely or in a great degree upon the weighing of conflicting testimony and the credibility of witnesses, are entitled to great weight upon review. (*De Souza v. Soares*, 22 Haw. 17; *McCandless v. Castle*, 25 Haw. 22; *Nawahie v. Goo Wan Hoy*, 26 Haw. 137; *Jellings v. Garcia*, 29 Haw. 698.) This adoption, however, has and does not preclude a review of the entire case with independent findings of fact and rulings by the appellate court, should the record on review so warrant. (*Pinheiro v. Pinheiro*, 32 Haw. 659.)

The sole question presented, therefore, is whether the evidence is such as to warrant the findings upon which the decree is premised, it being incumbent upon the petitioner-appellant seeking reversal thereof to disclose error or sufficient grounds warranting reversal of the decree rendered.

The petitioner asserts that bad faith and fraud were practiced upon him by the respondents resulting in his exclusion from the copartnership as formed on October 20, 1941. From a review of the record and the facts established below, we find that the petitioner has failed to prove either bad faith, a violation of or exclusion from the oral agreement that he become a party purchaser, a violation of confidence reposed by him in the respondents, or fraud perpetrated upon him by any or all of the respondents.

The crux of the petitioner's position, which we deem to have been affirmatively established by the testimony [57] as found by the trial judge, is one of nonperformance. The record bears no recession or cancellation of the original agreement which entitled the petitioner to participate in the purchase conditioned upon the payment of his contributive share of \$3000, by any or all of the respondents, or by the petitioner himself. Under the oral agreement with the seller fixing the time of payment of the purchase price as October 1, 1941, a limitation of time for performance by the petitioner, during which he was to tender his contributive share, was fixed and agreed upon. Of this limitation and due date the petitioner, as a party to the very agreement, possessed positive and unequivocal knowledge and notice. In addition to the fact that the experimental period of operation by the party purchasers was to terminate on October 1, 1941, during which period the petitioner had ample opportunity to tender his contributive share, the evi-

dence further discloses that the sale, by way of execution of all requisite documents and transfers, was not consummated until October 20, 1941, retroactive to October 1, 1941. The Petitioner was, by operation of time and with the acquiescence of the respondents, gratuitously accorded an extra period of dispensation in which to tender his contributive share. During this twenty-day period of additional concession, the petitioner failed to perform, and has not, in our opinion and as found by the trial judge, established any valid reason for his default. The letter of October 6, 1941, from Fook Hing Tong to the petitioner, fourteen days prior to the actual consummation of the sale, contains an affirmance that the original agreement between all party purchasers, including the petitioner, was still in effect, though the [58] trial period and the due date of the purchase price on October 1, 1941, expired six days prior thereto. The period within which the petitioner could have tendered his contributive share was thereby extended to October 20, 1941. Of this extension of time in which to perform, the petitioner was also given notice. The trial judge found that as of October 1, 1941, the petitioner unquestionably possessed a right upon making contribution of the sum of \$3000 to share in the business to that extent. In this we concur. Upon review of the record we are of the opinion that in addition thereto, the petitioner possessed an extended right and period of performance to and including October 20, 1941, the date of the consummation of the sale.

The purchase price was payable by the party purchasers on October 1, 1941. The petitioner, as a party to that oral agreement, was aware of and so bound, as were all the party purchasers, by this due date of payment. The record reveals no denial by the petitioner of notice or understanding of this fact. On the contrary, he affirmatively alleges such to be the fact in his bill.

The record leaves no doubt that the petitioner originally intended, together with the respondents, to become a party purchaser and enter into the liquor and restaurant business as agreed upon. It affirmatively discloses that he did not, however, pursue this intention by performance. The record further discloses that petitioner's right of contribution was expressly conditioned upon tender of his contributive share as agreed upon. This he failed to do.

The respondents, upon petitioner's default, contributed the sum of \$25,000, which was paid to the sellers as [59] the purchase price of the business as agreed upon. They thereupon formed and registered a copartnership between themselves excluding the petitioner, to the end that they, as the remaining party purchasers, would be qualified to render continuity to the operation of the business in conformance with the attending legal requisites. The petitioner failed to tender his contributive share to the enterprise and has given no valid excuse for failing to do so, and was thereby precluded from participating therein as a result of this failure. He has further failed, in this court's opinion upon review of the

record, to establish his asserted right to be presently included as a member of the copartnership formed on October 20, 1941, retroactive to October 1, 1941.

The respondents, on the contrary, violated no confidence the petitioner reposed in them, violated no oral agreement entered into between the original party purchasers, displayed no bad faith, nor practiced or perpetrated fraud upon the petitioner in respect of his exclusion from membership in the registered copartnership. They elected to adhere to their original agreement as party purchasers and pursuant thereto contributed their respective shares as agreed upon. They further acquiesced in and accorded the petitioner the extended period of grace above referred to during which time he also failed to perform. He admittedly defaulted.

Upon the entire record on review, whether or not the original oral agreement between the parties to the proceeding constituted a copartnership or joint adventure binding them with the legal incidents flowing therefrom, is not pertinent to the disposition of the issues of facts presented which are determinative of the sole question presented on appeal. [60]

Measuring the findings of fact of the trial judge by affixing the weight attributable to them under the ruling adopted, *supra*, this court finds that the evidence below warranted the findings made.

No reason having been established on review for

disturbing those findings, the decree dismissing the bill is affirmed.

/s/ S. B. KEMP,

/s/ EDWARD A. TOWSE,

/s/ JOHN ALBERT

MATTHEWMAN.

D. R. CASTLEMAN, JR., and

H. K. H. LEE (also on the briefs) for Appellant.

T. M. WADDOUPS (ROBERTSON, CASTLE & ANTHONY with him on the brief (for Appellees.

Filed August 18, 1950. [61]

[Title of Court and Cause.]

NOTICE OF DECISION ON APPEAL

To Hon. Willson C. Moore, Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

Please Take Notice that in the above-entitled cause the Supreme Court has entered the following decision on appeal:

“Pursuant to the opinion rendered and filed in the above-entitled cause on August 18, 1950, the decree dismissing the bill is affirmed.”

Dated: Honolulu, T. H., Sept. 12, 1950.

By the Court:

[Seal] /s/ LEOTI V. KRONE,
Clerk.

The form of the foregoing notice is hereby approved and It Is Ordered that the same issue forthwith.

Dated: Honolulu, T. H., September 12, 1950.

/s/ EDWARD A. TOWSE,
Associate Justice Supreme Court, Territory of Hawaii.

Filed Sept. 12, 1950. [62]

[Title of Court and Cause.]

WITHDRAWAL OF COUNSEL

Come now Herbert K. H. Lee and David R. Castleman, Jr. and hereby withdraw as counsel for Hung Chin Ching, Appellant in the above-entitled cause and Court.

Dated at Honolulu, T. H., this 20th day of September, A. D., 1950.

HERBERT K. H. LEE, and
DAVID R. CASTLEMAN, JR.,

By /s/ HERBERT K. H. LEE.

Approved:

/s/ HUNG CHIN CHING,
Appellant.

Filed September 20, 1950. [63]

[Title of Court and Cause.]

APPEARANCE OF COUNSEL

Comes now Shiro Kashiwa and hereby enters his appearance as attorney for Hung Chin Ching, Appellant in the above-entitled cause and Court.

Dated at Honolulu, T. H., this 19th day of September, A. D., 1950.

/s/ SHIRO KASHIWA.

I hereby authorize the foregoing Appearance.

/s/ HUNG CHIN CHING,
Appellant.

Filed September 20, 1950. [64]

[Title of Court and Cause.]

PETITION FOR REHEARING

To the Honorable Justices of the Supreme Court of
the Territory of Hawaii:

Comes now Hung Chin Ching, Appellant above
named, and respectfully shows:

I.

That Petitioner is the Appellant in the above-entitled cause and Court.

II.

That the above-entitled cause was remanded to

this Court by an order entered in the above-entitled cause and Court and that this cause is presently before this Court.

III.

That the former attorneys, Herbert K. H. Lee and David R. Castleman, Jr., who represented the Appellant withdrew as of September 20, 1950, and thereafter Appellant has been represented by Shiro Kashiwa.

IV.

That the Supreme Court erred in completely disregarding the following pertinent fact findings of the lower Court: [65]

“After some discussion Lum agreed to sell for \$25,000.00 plus the inventory and the Tenn brothers and Ching agreed to buy the Green Mill * * *” (Page 2 of trial Court’s written decision). (Emphasis ours.)

“At this time it was agreed that Ching’s share would be \$3,000.00 and the balance would be paid by the Tenn brothers * * *” (Page 3 of trial Court’s written decision.) (Emphasis ours.)

It is submitted that upon the foregoing findings this Court must necessarily find that each of the buyers, including the Appellant, was jointly and severally liable to the seller Lum for \$25,000.00 plus about \$10,000.00 for the inventory. In other words the Appellant incurred a liability of \$35,000.00. The seller Lum could have sued the Appellant and have obtained judgment for \$35,000.00 against the Appel-

lant if the deal did not go through. Furthermore, the Tenn brothers could have sued the Appellant for \$3,000.00 as his contributive share. These conclusions are not to be denied because the legal result of the trial Court's findings necessarily leads to these further legal conclusions. Furthermore, as soon as the contract was entered into the Appellant together with the Tenn brothers had, as against Lum, the right to enforce the contract in a court of equity by way of specific performance. *Chamber of Commerce v. Barton* (1937), 195 Ark. 274, 112 S. W. (2) 619; *Brady v. Yost*, 6 Idaho 273, 55 P. 542; *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 A. 312, 19 Am. St. Rep. 409; *Tong On v. Tai Kee*, 11 Haw. 560. See *Sakata v. Yoshikawa*, 22 Haw. 288, where a lease is involved as in present case. In other words, the Appellant together with the Tenn brothers acquired a right enforceable in equity—often called “equitable title.” There is no evidence whatever that the Appellant ever released Lum, the seller, from Lum's agreement to sell to the Appellant also. Neither was there a default [66] in the payment of the purchase price as far as Lum was concerned. Such being the case, the Tenn brothers took the title to the business as trustees for themselves and the Appellant. In 49 Am. Jur. 171 it is stated in paragraph 148 as follows:

“Conflicting Purchasers. It is well settled that one who takes a deed of land with knowledge of an outstanding contract or title takes it subject to such contract or title, and the

person who purchases property with notice of a prior agreement by the vendor to convey to another person is regarded as the trustee of the latter. Therefore, one purchasing property with notice that the grantor has contracted to convey it to another may be compelled to perform the contract in the same manner and to the same extent as his grantor would have been liable to do had he not transferred the legal title.” (Emphasis ours.)

Since the Tenn brothers held the business in trust for the Appellant as far as his pro rata share is concerned the Appellant was and is entitled to an accounting.

V.

That the Supreme Court erred in affirming the lower Court’s decision in that upon the trial Court’s finding:

“After some discussion Lum agreed to sell for \$25,000.00 plus the inventory and the Tenn brothers and Ching agreed to buy the Green Mill * * *” (Page 2 of trial Court’s written decision.)

“At this time it was agreed that Ching’s share would be \$3,000.00 and the balance would be paid by the Tenn brothers * * *” (Page 3 of trial Court’s written decision.) (Emphasis ours.)

The Tenn brothers and the Appellant jointly held an equitable title to the premises and the evidence is undisputed that they jointly as of October 1,

1941, operated the business and that the Appellant rendered services, the lower Court should have found a joint adventure. All of the elements of a joint venture were present. First of all they combined and agreed to purchase and thereby created a joint proprietorship by [67] way of equitable title; the management and control was mutual; the agreement was to share the profits. There could not have been a more clear case of joint adventure.

VI.

The trial Court and this Court erred in completely disregarding the Appellant's contribution of services in that:

“Effect of performance. The performance of services by a joint adventurer in accordance with his agreement with associate or associates gives him, not only a vested interest in the profits derived from the successful prosecution of the enterprise * * * but also in the real and personal property embarked therein, as effectually as though he had contributed a part of the capital with which it was purchased * * *”
48 C. J. S. 836.

Section 9578 of the Revised Laws of Hawaii, 1945, provides:

“The several courts, in their decisions, shall have due regard to vested rights.”

Once a joint adventure is in operation and a party renders services his rights in the joint venture cannot be forfeited summarily.

In 33 C. J. 854 it is stated:

“After the agreement has been partially executed by the member’s payment of a part of the capital or the performance of services, his associates cannot forfeit his interest in the enterprise and exclude him from further participation therein merely because of his failure to pay the full amount promised by him, especially when no demand has been made upon him for contribution and he has not refused to pay his share; but his interest is held subject to the claim of his associates for any losses which his default may have caused them.”
(Emphasis ours.)

VII.

The trial Court in its oral decision found as follows:

“Well, this Court believes that at the time that this partnership was actually consummated it really amounted to a squeeze-out of Ching, and at that time there is no question in this Court’s mind that had Ching proceeded to claim or demand his share that he would unquestionably be entitled to obtain it.” (Tr. 264.)
(Emphasis ours.) [68]

The foregoing was a fact finding of fraud on the part of the Tenn brothers.

The later written decision did not in any manner negative said finding. None of the findings in the written decision are contrary to this finding. It is submitted that since equity courts in the Territory

of Hawaii are not required to write their decisions by any statute, its decisions may be either oral or written or may be partly written and partly oral.

In 3 Am. Jur. 457 it is stated:

“Findings of fact made by the trial Court in the ruling upon motions or in making rulings in the course of a trial are regarded on appeal in much the same manner as findings of fact upon which the final judgment is rendered.”

See also *McKenny v. Wood* (Me.), (1911), 80 Atl. 836, in which the Court held that where the laws of the state do not require a written decision the fact that the decision was signed or unsigned is immaterial.

It is respectfully submitted that since the finding of fact, being “squeezed out,” in the oral decision was not overruled by any subsequent finding of fact by the judge, the former finding must stand. It is submitted that if the Appellant was squeezed out a court of equity should have granted him relief.

Wherefore, Petitioner prays that a rehearing be granted to the Petitioner.

Dated at Honolulu, T. H., this 26th day of September, A. D. 1950.

HUNG CHIN CHING,
Appellant.

By /s/ SHIRO KASHIWA,
His Attorney.

Filed September 27, 1950. [69]

[Title of Court and Cause.]

DECISION ON PETITION FOR REHEARING

Decided November 16, 1950

The petition for rehearing upon the opinion reported in 38 Hawaii 616 asserts four grounds.

Ground one asserts that this court disregarded two findings of fact by the trial court, first: that the seller agreed to sell and the respondents and petitioner agreed to purchase the business; second, that all parties to the proceeding agreed inter se that petitioner's contributive share of the purchase price was to be \$3,000, the balance to be contributed by the respondents. These findings were adopted and considered, as evidenced by their recitation in the opinion, they being expressly enumerated therein.

The petitioner-appellant urges that as a result of the conclusion of this court in disregard of the foregoing he, jointly and severally with the respondents, would have incurred a potential liability for the entire purchase price of \$35,000, and the vendor could therefore have sought and [70] obtained judgment against him in that amount in the event the purchase was not consummated; or, in the alternative, the respondents could have proceeded likewise to enforce payment of the petitioner's contributive share of \$3,000; and that resultingly, all of the joint purchasers, including the petitioner-appellant, acquired a right to enforce the purchase agreement against the vendor by specific performance by and through their equitable title; and the

petitioner, not having released the vendor from his agreement to sell to him, the respondents thereby did in fact acquire the business as trustees for themselves and the petitioner.

Assuming, without deciding, that the principles of law urged are applicable to those factual situations had they been before the court for determination, nevertheless neither the theory nor the principles urged were presented, for the reason that the petitioner admittedly defaulted in his failure to contribute his agreed share of the purchase price. The authorities cited are readily distinguishable from the facts presented. They involve suits for specific performance of contracts to enforce the conveyance of property, equity jurisdiction being premised upon the inability of a court of law to accord the aggrieved parties in those circumstances a full, adequate and complete remedy—as between vendor and vendee. The instant litigation is between joint vendees alone. The cases also present factual situations where, as between vendors and vendees, either partial or complete performance by either or both of the parties exists, with the resulting acquisition and assertion of an [71] equitable right of specific performance predicated thereon. The factual situations and the principles urged are inapplicable to the instant appeal.

The second ground urges error in the failure of this court to conclude that a joint adventure existed between the parties to the proceeding. Reiterating the conclusion heretofore announced that a finding

of whether the purchase agreement between the parties constituted them copartners or joint adventurers, binding them with the legal incidents flowing therefrom, was not necessary to the disposition of the issues presented, this ground is without merit.

Ground three is premised upon the assumption of a finding that a joint adventure did in fact exist between the parties. For the reasons stated, *supra*, this ground is rejected.

Ground four urges the adoption by this court of the trial judge's oral findings rendered prior to the entry of the written decision and decree. The written decision is at variance with the oral findings.

The authorities cited in support of the petitioner's contention is that findings of fact made by a trial court in the course of a trial are regarded on appeal in much the same manner as findings of fact upon which the final judgment is rendered. This is a broad statement of the rule applicable in the absence of a governing statute. The contention is urged, however, without consideration of the controlling statutes of this jurisdiction. This is an appeal from a decree of a circuit judge, at chambers, in equity. [71-A] (R. L. H. 1945, §9604 as am.) The jurisdiction of this court to hear and determine the cause is premised upon that section.

"Appeals shall be allowed from all decisions, judgments, orders or decrees of circuit judges in chambers, to the Supreme Court * * *" R. L. H. 1945, §9503 as am.

"It has been repeatedly held by this court that

appeals under this statute must be taken from the decree and not from the decision. *Barthrop v. Kona Coffee Co.*, 10 Haw. 398, 402; *Kahai v. Kuhia*, 11 Haw. 3, 5; *Makainai v. Lalakea*, 24 Haw. 518, 521; *Un Wo Sang v. Alo*, 7 Haw. 673, 674, 675." *Ogata v. Ogata*, 30 Haw. 620, 621, 622.

The present appeal is from the decree entered on September 2, 1948, dismissing the bill. This decree, being as it is final in form, and determinative of the rights of the parties to the controversy, was the final and appealable decree upon which the appeal was allowed and the jurisdiction of this court invoked. Ground four is without merit.

Chief Justice Samuel B. Kemp and Circuit Judge John A. Matthewman, who concurred in the opinion, are disqualified from participation in the instant petition for rehearing by virtue of their retirement.

The petition for rehearing is denied without argument.

S. Kashiwa for the petition.

[Seal] /s/ EDWARD A. PAWSE,
Associate Justice.

Attest:

/s/ GUS K. SPROAT,
Clerk.

A true copy.

Filed Sept. 27, 1950. [72]

[Title of Court and Cause.]

NOTICE OF INTENTION TO APPEAL AND
MOTION FOR ORDER WITHHOLDING
MANDATE TO THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT, TERRI-
TORY OF HAWAII

Comes now Hung Chin Ching, Petitioner-Appellant in the above-entitled Court and Cause, and hereby gives notice that he intends to appeal the above-entitled cause to the United States Court of Appeals for the Ninth Circuit within the time permitted by law, and moves that an appropriate order be entered by this Court under Rule 10 of the Rules of the Supreme Court of Hawaii withholding the issuance of a mandate from this Court to the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

This motion is based on the affidavit hereto attached.

Dated at Honolulu, T. H., this 22nd day of November, A. D. 1950.

HUNG CHIN CHING,
Appellant,

By /s/ SHIRO KASHIWA,
His Attorney. [73]

AFFIDAVIT

Territory of Hawaii,
City and County of Honolulu—ss.

Shiro Kashiwa, being first duly sworn, on oath deposes and says: That he is the attorney of record for Hung Chin Ching, Petitioner-Appellant; that said Hung Chin Ching intends to appeal the above-entitled cause to the United States Court of Appeals for the Ninth Circuit; that affiant is now in the process of preparing an appeal to the United States Court of Appeals for the Ninth Circuit.

/s/ SHIRO KASHIWA.

Subscribed and sworn to before me this 22nd day of November, A. D. 1950.

[Seal] /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires August 9, 1951.

A true copy.

[Endorsed]: Filed November 22, 1950. [74]

[Title of Court and Cause.]

ORDER

It Is Hereby Ordered that any mandate in the above-entitled cause from this Court to the Circuit Court of the First Judicial Circuit be stayed until further order of this Court.

Dated at Honolulu, T. H., this 22nd day of November, A. D. 1950.

[Seal] /s/ LOUIS LE BARON,
Justice of the Above-Entitled
Court.

A true copy.

[Endorsed]: Filed November 22, 1950. [75]

[Title of Court and Cause.]

MOTION FOR LEAVE TO FILE AFFI-
DAVIT REGARDING JURISDICTIONAL
AMOUNT ON APPEAL

Comes now petitioner-appellant in the above-entitled Court and cause and hereby moves that the petitioner-appellant be given leave to file in the above-entitled cause and Court the attached affidavit showing that the amount in litigation in said cause exceeds the sum of \$5,000.00, the jurisdictional amount necessary for any cause to be appealed from the above-entitled Court to the United States Court of Appeals for the Ninth Circuit.

This motion is based on the records of this cause and upon the affidavit attached hereto.

Dated at Honolulu, T. H., this 1st day of December, A. D. 1950.

HUNG CHIN CHING,
Appellant,

By /s/ SHIRO KASHIWA,
His Attorney. [76]

AFFIDAVIT IN SUPPORT OF MOTION

Territory of Hawaii,
City and County of Honolulu—ss.

Shiro Kashiwa, being first duly sworn, on oath deposes and says:

That he is the attorney for the petitioner-appellant; that he is now preparing an appeal of the above-entitled cause to the United States Court of Appeals for the Ninth Circuit; that upon an examination of the record it does not appear that more than \$5,000.00 is involved in the litigation; that upon affiant's examination affiant has found that the amount in litigation far exceeds the said jurisdictional amount of \$5,000.00; and that he makes this affidavit in support of the foregoing motion and upon his own knowledge.

/s/ SHIRO KASHIWA. •

Subscribed and sworn to before me this 1st day of December, A. D. 1950.

[Seal] LEOTI V. KRONE,
Clerk, Supreme Court.

AFFIDAVIT REGARDING JURISDICTIONAL
AMOUNT

Territory of Hawaii,
City and County of Honolulu—ss.

Hung Chin Ching, being first duly sworn, on oath deposes and says:

That he is the petitioner-appellant in the above-entitled cause and Court; that if an accounting of profits as prayed for in the complaint is ordered in the said cause the petitioner-appellant would be entitled to recover about \$60,000.00; that in addition thereto the reasonable value of the business itself which petitioner seeks to recover is about \$20,000.00, of which petitioner is entitled to 10% or \$2000.00; that there is involved in the above-entitled cause a total amount of \$62,000.00 which petitioner-appellant would be entitled to recover if a decision and judgment favorable to the petitioner-appellant is entered in said cause upon final disposition of said cause; that this affidavit is made [78] on affiant's own knowledge; that he makes this affidavit for the purpose of supporting his appeal of the above-entitled cause to the United States Court of Appeals for the Ninth Circuit from the Supreme Court of Hawaii.

/s/ HUNG CHIN CHING.

Subscribed and sworn to before me this 30th day of November, A. D. 1950.

[Seal] /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires August 9, 1951. [79]

ORDER GRANTING LEAVE TO FILE AFFI-
DAVIT AS TO JURISDICTIONAL AMOUNT

It Is Hereby Ordered that the affidavit of Hung Chin Ching, petitioner-appellant, hereto attached, be filed in the records of this Court and cause.

Dated at Honolulu, T. H., this 1st day of December, A. D. 1950.

SUPREME COURT OF
HAWAII,

By /s/ LOUIS LE BARON,
Its Associate Justice.

[Endorsed]: Filed December 1, 1950. [80]

[Title of Court and Cause.]

BOND

Know All Men by These Presents, that Hung Chin Ching, of Honolulu, City and County of Honolulu, Territory of Hawaii, and a resident thereof, as Principal, and Hung Wai Ching and Hung Wo Ching, both of Honolulu, City and County of Hono-

lulu, Territory of Hawaii, and residents thereof, as Sureties, jointly and severally are held, firmly bound and indebted to the United States of America in the sum of Two Hundred Fifty Dollars (\$250.00) to be levied on our goods, chattels, lands and tenements, upon this condition:

Whereas, Hung Chin Ching, principal, has taken an appeal, as petitioner, from the Supreme Court of the Territory of Hawaii to the United States Court of Appeals for the Ninth Circuit, to reverse the judgment dated and entered in said cause on the 12th day of September, 1950, and the Order denying the Petition for Rehearing dated the 16th day of November, 1950. [81]

Now, Therefore, if the above bounden principal, petitioner, shall prosecute his appeal without delay and answer for and pay all costs if he fails to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

In Witness Whereof, the parties hereto have hereunto set their hands and seals this 2nd day of December, A. D. 1950.

/s/ HUNG CHIN CHING,
Principal.

/s/ HUNG WAI CHING,

/s/ HUNG WO CHING,
Sureties.

Territory of Hawaii,
City and County of Honolulu—ss.

Hung Wai Ching and Hung Wo Ching, sureties in the within bond, do severally solemnly swear that they have property situated within the Territory of Hawaii subject to execution and are worth in property within said Territory the amount of the penalty specified herein over and above all of their debts and liabilities.

/s/ HUNG WAI CHING,

/s/ HUNG WO CHING.

Subscribed and sworn to before me this 2nd day of December, A. D. 1950.

[Seal] /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires August 9, 1951. [82]

The foregoing bond is approved as to amount and sufficiency of sureties.

SUPREME COURT OF
HAWAII,

[Eeal] /s/ EDWARD A. TOWSE,
Its Associate Justice.

[Endorsed]: Filed December 6, 1950. [83]

[Title of Court and Cause.]

PETITION FOR APPEAL

To the Honorable Supreme Court of the Territory
of Hawaii:

Comes now Hung Chin Ching, of Honolulu, City and County of Honolulu, Territory of Hawaii, appellant above named and petitioner herein, and deeming himself aggrieved by the Decision, Decree and Judgment of the Supreme Court of the Territory of Hawaii made and entered in the above-entitled cause on the 12th day of September, 1950, and by the denial of the petition for rehearing on the 16th day of November, 1950, for the reasons and grounds specified in the Assignment of Errors filed herein, does pray that this appeal may be allowed; that the Court do stay further proceedings in this cause pending the determination of the issues raised on said appeal; that the Court do set the amount of the penalty in the appeal bond, a copy of which is filed herein; and [84]

Petitioner does further pray that a transcript of the record and proceedings, more particularly set forth in the praecipe filed herein, upon which the said Decree was made, may be sent to the United States Court of Appeals for the Ninth Circuit; and that said Decree and Judgment may be reversed or otherwise corrected as to the said Court of Appeals may by the premises deem just and equitable.

Dated at Honolulu, T. H., this 2nd day of December, A. D. 1950.

HUNG CHIN CHING,
Appellant,

By /s/ SHIRO KASHIWA,
His Attorney.

[Endorsed]: Filed December 6, 1950. [85]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now Hung Chin Ching, Petitioner-Appellant above named, by Shiro Kashiwa, his attorney, and files the following Assignment of Errors, upon which he will rely in the prosecution of his appeal in the above-entitled cause to the United States Court of Appeals for the Ninth Circuit from the Decision, Decree and Judgment entered herein on the 12th day of September, 1950, and from the Order denying the Petition for Rehearing dated November 16th, 1950, heretofore filed in this cause:

I.

That the Supreme Court of Hawaii erred in sustaining the decision and decree of the trial court.

II.

That the Supreme Court of Hawaii erred in holding that there was no constructive trust relationship by and between the respondent-appellees and the

petitioner-appellant after the former acquired title to the restaurant business. [86]

III.

That the Supreme Court of Hawaii erred in holding that there was no partnership relationship existing in spite of the fact that the restaurant business was launched and in active operation from and after October 1, 1941.

IV.

That the Supreme Court of Hawaii erred in holding that the petitioner-appellant had no suit for an accounting when he already performed services and had a vested interest in the partnership.

V.

That the Supreme Court of Hawaii erred in completely disregarding the fact finding of the trial court that the petitioner-appellant was "squeezed out" by the respondents-appellees.

VI.

That the Supreme Court of Hawaii erred in completely disregarding the oral decision of the trial court which was perfectly consistent with the written decision; that the said oral decision amounted to a finding of fraud practiced by the respondents-appellees against the petitioner-appellant.

VII.

That the Supreme Court of Hawaii erred in not overruling the trial court's finding and conclusion that the partnership was never formed and that

it was a mere agreement to form a partnership when the evidence showed that there was an actual partnership in operation. [87]

VIII.

That the Supreme Court of Hawaii erred in holding for the respondents-appellees even though it failed to find that a demand was made by the respondents-appellees upon the petitioner-appellant.

IX.

That the Supreme Court of Hawaii erred in concluding that from the evidence adduced there was no showing of a partnership.

X.

That the Supreme Court of Hawaii erred in sustaining the fact findings of the trial court in so far as they were adopted by the said Supreme Court.

XI.

That the Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

“The record bears no recession or cancellation of the original agreement which entitled the petitioner to participate in the purchase conditioned upon the payment of his contributive share of \$3,000, by any or all of the respondents, or by the petitioner himself.” (Objectionable portion emphasized.)

XII.

That the Supreme Court of Hawaii erred in mak-

ing the following fact findings and conclusions upon the evidence adduced in the case:

“Under the oral agreement with the seller fixing the time of payment of the purchase price as October 1, 1941, a limitation of time for performance by the petitioner, during which he was to tender his contributive share, was fixed and agreed upon.” (Objectionable portion emphasized.) [88]

XIII.

That the Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

“In addition to the fact that the experimental period of operation by the party purchasers was to terminate on October 1, 1941, during which period the petitioner had ample opportunity to tender his contributive share, the evidence further discloses that the sale, by way of execution of all requisite documents and transfers, was not consummated until October 20, 1941, retroactive to October 1, 1941. The petitioner was, by operation of time and with the acquiescence of the respondents, gratuitously accorded an extra period of dispensation in which to tender his contributive share. During this twenty-day period of additional concession, the petitioner failed to perform, and has not, in our opinion and as found by the trial judge, established any valid reason for his default.” (Objectionable portion emphasized.)

XIV.

That the Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

“The letter of October 6, 1941, from Fook Hing Tong to the petitioner, fourteen days prior to the actual consummation of the sale, contains an affirmance that the original agreement between all party purchasers, including the petitioner, was still in effect, though the trial period and the due date of the purchase price on October 1, 1941, expired six days prior thereto. The period within which the petitioner could have tendered his contributive share was thereby extended to October 20, 1941. Of this extension of time in which to perform, the petitioner was also given notice.” (Objectionable portion emphasized.) [89]

XV.

That the Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

“The purchase price was payable by the party purchasers on October 1, 1941. The petitioner, as a party to that oral agreement, was aware of and so bound, as were all the party purchasers, by this due date of payment.” (Objectionable portion emphasized.)

XVI.

That the Supreme Court of Hawaii erred in mak-

ing the following fact findings and conclusions upon the evidence adduced in the case:

“The record further discloses that petitioner’s right of contribution was expressly conditioned upon tender of his contributive shares as agreed upon. This he failed to do.” (Objectionable portion emphasized.)

XVII.

That the Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

“The respondents, upon petitioner’s default, contributed the sum of \$25,000, which was paid to the sellers as the purchase price of the business as agreed upon. They thereupon formed and registered a copartnership between themselves excluding the petitioner, to the end that they, as the remaining party purchasers, would be qualified to render continuity to the operation of the business in conformance with the attending legal requisites. The petitioner failed to tender his contributive share to the enterprises and has given no valid excuse for failing to do so, and was thereby precluded from participating therein as a result of this failure. He [90] has further failed, in this court’s opinion upon review of the record, to establish his asserted right to be presently included as a member of the copartnership formed on October 20, 1941, retroactive to October 1, 1941.” (Objectionable portion emphasized.)

XVIII.

That the Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

“The respondents, on the contrary, violated no confidence the petitioner reposed in them, violated no oral agreement entered into between the original party purchasers, displayed no bad faith, nor practiced or perpetrated fraud upon the petitioner in respect of his exclusion from membership in the registered copartnership. They elected to adhere to their original agreement as party purchasers and pursuant thereto contributed their respective shares as agreed upon. They further acquiesced in and accorded the petitioner the extended period of grace above referred to during which time he also failed to perform. He admittedly defaulted.”
(Objectionable portion emphasized.)

XIX.

That the Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

“Upon the entire record on review, whether or not the original oral agreement between the parties to the proceeding constituted a copartnership or joint adventure binding them with the legal incidents flowing therefrom, is not pertinent to the disposition of the issues of facts presented which are determinative of the

sole question presented on appeal.” (Objectionable portion emphasized.) [91]

XX.

That the Supreme Court of Hawaii erred in affirming the following fact finding of the trial court:

“The respondent Fook Hing Tong then being on the island of Maui, replied to both the petitioner and respondent Chong Hing Tenn on October 6, 1941, and expressly reaffirmed the oral agreement among the party purchasers and reassured the petitioner that he was to share in the business to the extent of a three-share interest upon the express condition that he make contribution of the amount representing his three-share interest as agreed upon.” (Objectionable portion emphasized.)

Wherefore, petitioner-appellant prays that because of the errors hereinabove assigned, the Decree and Judgment entered in this cause on the 12th day of September, 1950, and the Order denying the petition for rehearing dated the 16th day of November, 1950, be vacated, reversed and corrected.

Dated at Honolulu, T.H., this 2nd day of December, A.D. 1950.

HUNG CHIN CHING,
Appellant.

By /s/ SHIRO KASHIWA,
His Attorney.

[Endorsed]: Filed December 6, 1950. [92]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

Upon filing by the petitioner-appellant, Hung Chin Ching, of a bond in the sum of \$250.00 with good and sufficient sureties, the appeal in the above-entitled cause is hereby allowed.

Dated at Honolulu, T.H., this 6th day of Dec., A.D. 1950.

SUPREME COURT OF HAWAII,

[Seal] By /s/ EDWARD A. TOWSE,
Its Associate Justice.

[Endorsed]: Filed December 6, 1950. [93]

[Title of Court and Cause.]

NOTICE OF APPEAL

To Fook Hing Tong, Chong Hing Tenn and Kui Hing Tenn, Appellees Above Named, and Robertson, Castle & Anthony, Their Attorneys:

You and each of you are hereby notified that an appeal has been taken from the Decree and Judgment entered herein on the 12th day of September, 1950, and from the Order denying the Petition for Rehearing made and entered on the 16th day of November, 1950, heretofore filed in this cause.

Dated at Honolulu, T.H., this 2nd day of December, A.D. 1950.

HUNG CHIN CHING,

Appellant,

By /s/ SHIRO KASHIWA,

His Attorney.

[Endorsed]: Filed November 6, 1950. [94]

[Title of Court and Cause.]

CITATION ON APPEAL

The United States of America—ss.

The President of the United States of America to:
Fook Hing Tong, Chong Hing Tenn and Kui
Hing Tenn, and to Robertson, Castle & An-
thony, Their Attorneys:

You are hereby cited and admonished to be and appear at the United States Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within forty (40) days from the date of this citation, pursuant to an order allowing appeal, filed in the office of the Clerk of the Supreme Court of the Territory of Hawaii, wherein Hung Chin Ching is the Petitioner-Appellant and you Fook Hing Tong, Chong Hing Tenn and Kui Hing Tenn are Respondents-Appellees, to show cause, if any you have, why the Decree in such appeal mentioned and the order denying rehearing should not be corrected and reversed, and

why speedy justice should not be done to the parties herein. [95]

Witness, the Honorable Edward A. Towse, Associate Justice of the Supreme Court of the Territory of Hawaii, this 6th day of December, A.D. 1950.

SUPREME COURT OF
HAWAII,

[Seal] /s/ EDWARD A. TOWSE,
Associate Justice.

[Endorsed]: Filed December 6, 1950. [95-A]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD
TO UNITED STATES COURT OF AP-
PEALS FOR NINTH CIRCUIT

To the Clerk of the Above-Entitled Court:

You will please prepare transcript of record of this cause to be filed in the Office of the Clerk of the United States Court of Appeals for the Ninth Circuit and include in said transcript the following pleadings and papers on file, to wit:

1. Petitioner's Bill to Declare Trust and Lien, for an Accounting, for Receiver, and for Money Judgment, filed April 5, 1944. (Omit: Motion for Order to Show Cause, Order to Show Cause, Chamber Summons, and Sheriff's Return.)
2. Fourth Amended Bill to Declare Trust and

Lien, for an Accounting, for Receiver, and for Money Judgment, filed November 5, 1947.

3. Answer to Fourth Amended Bill to Declare Trust and Lien, for an Accounting, for Receiver, and for Money Judgment, filed June 16, 1948.

4. Clerk's Minutes.

5. Decision, filed August 25, 1948.

6. Decree, filed September 2, 1948. [96]

7. Appeal and Notice of Appeal, filed September 9, 1948.

8. Transcript No. 1077.

9. The following Exhibits:

- a. Petitioner's Exhibit A
- b. Petitioner's Exhibit A-1
- c. Petitioner's Exhibit B
- d. Petitioner's Exhibit C
- e. Petitioner's Exhibit D
- f. Petitioner's Exhibit E
- g. Petitioner's Exhibit F
- h. Petitioner's Exhibit G
- i. Petitioner's Exhibit H
- j. Petitioner's Exhibit I
- k. Petitioner's Exhibit J
- l. Respondent's Exhibit I
- m. Respondent's Exhibit II
- n. Respondent's Exhibit III
- o. Respondent's Exhibit IV

10. Amendment to Brief (Appellant's), filed March 9, 1950.

11. Opinion of Court, filed August 18, 1950.

12. Notice of Decision on Appeal, filed September 12, 1950.

13. Petition for Rehearing, filed September 27, 1950.

14. Decision (Petition for Rehearing), filed November 16, 1950.

15. Notice of Intention to Appeal and Motion for Order Withholding Mandate to the Circuit Court of the First Judicial Circuit, Territory of Hawaii, and Affidavit, filed November 22, 1950.

16. Order (Staying Mandate to Circuit Court), filed November 22, 1950.

17. Petition for Appeal.

18. Notice of Appeal.

19. Bond.

20. Order Allowing Appeal.

21. Assignment of Errors.

22. This Praecipe for Transcript of Record. [97]

23. Citation on Appeal.

24. Motion to File Affidavit, Affidavit (Appellant's Counsel's) and Affidavit (Appellant's).

25. Order Granting Leave to File Affidavit.

26. Receipt by Respondents Appellee's Counsel of papers listed in items 15 to 25 of this praecipe.

In preparing above items 1-7 and 10-26, inclusive, Clerk will omit Title of Court and Cause.

Said transcript to be prepared as required by law, and the rules of this Court, and the rules of the United States Court of Appeals for the Ninth Circuit, and filed in the Office of the Clerk of said Court of Appeals at San Francisco, in the State of California, before expiration of period fixed by law for filing the record on appeal.

Dated at Honolulu, T.H., this 2nd day of December, A.D. 1950.

. HUNG CHIN CHING,
Appellant,

By /s/ SHIRO KASHIWA,
His Attorney.

[Endorsed]: Filed December 6, 1950. [98]

[Title of Court and Cause.]

RECEIPT OF COPIES
CERTIFICATE OF ACKNOWLEDGMENT

The undersigned hereby acknowledge receipt of copies of the following:

1. Notice of Intention to Appeal and Motion for Order Withholding Mandate to the Circuit Court of the First Judicial Circuit, Territory of Hawaii, and Affidavit filed November 22, 1950.
2. Order (Staying Mandate to Circuit Court) filed November 22, 1950.
3. Petition for Appeal.
4. Notice of Appeal.
5. Bond.
6. Order Allowing Appeal.
7. Assignment of Errors.
8. Praecipe for Transcript of Record.
9. Citation on Appeal.
10. Motion to File Affidavit, Affidavit (Appellant's Counsel's) and Affidavit (Appellant's). [99]
11. Order Granting Leave to File Affidavit.

Dated at Honolulu, T.H., this 7th day of December, A.D. 1950.

ROBERTSON, CASTLE &
ANTHONY,

Attorneys for Appellees,

By /s/ ROBERT E. BROWN.

[Endorsed]: Filed December 7, 1950. [100]

[Title of Court and Cause.]

STATEMENT OF POINTS
DESIGNATION OF PARTS OF RECORD

Comes now Hung Chin Ching, Appellant herein, by his attorney, Shiro Kashiwa, and in compliance with subdivision 6 of Rule 19 requiring a concise statement of the points on which Appellant intends to rely on the appeal, hereby adopts as the points on appeal the assignment of errors appearing in the transcript of the record, and in compliance with the rules of this Court pertaining to the designation of the portion of the record to be printed, directs that the entire record on appeal, as set forth in the praecipe heretofore filed with the Clerk of the Supreme Court of the Territory of Hawaii, with the request that copies of the record as so designated be prepared and transmitted to this Court, be printed as the record on review.

Dated at Honolulu, T.H., this 18th day of December, A.D. 1950.

HUNG CHIN CHING,

Appellant,

By /s/ SHIRO KASHIWA,

His Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed December 18, 1950.

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii

No. E-4416

HUNG CHIN CHING,

Petitioner,

vs.

FOOK HING TONG, CHONG HING TENN, and
KUI HING TENN,

Respondents.

Transcript of testimony taken and proceedings had before the Honorable Willson C. Moore, Circuit Judge, at Honolulu, T. H., in the above-entitled cause, commencing on June 21, 1948.

Appearances:

HERBERT K. H. LEE, ESQ., and
DAVID R. CASTLEMAN, JR., ESQ.,
Appearing on Behalf of Petitioner.

THOMAS WADDOUPS, ESQ.,
Appearing on Behalf of Respondents.

PROCEEDINGS

June 21, 1948—9:00 o'Clock A.M.

(Upon the clerk calling the case, the following occurred:)

Mr. Lee: Ready for the petitioner.

Mr. Waddoups: Ready for the respondents.

The Court: Proceed.

(An opening statement was then made by Mr. Lee on behalf of the petitioner.)

Mr. Lee: I would like to call Dr. Tong to the stand, please.

The Court: Under the Statute?

Mr. Lee: Yes.

FOOK HING TONG

a respondent herein, called as a witness by the petitioner under the Statute, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lee:

Q. Please state your name.

A. Fook Hing Tong.

Q. You are a licensed physician? A. Yes.

Q. Practicing medicine in the Territory?

A. Yes.

Q. Do you know the petitioner, Hung Chin Ching? A. Yes.

Q. How long have you known him?

(Testimony of Fook Hing Tong.)

A. I first met him when I was working at the Emergency [2*] Hospital in 1939.

Q. At the time Mr. Ching was on the police force? A. Yes.

Q. Was it because of some of these emergency cases that came into the Receiving Hospital that you first met him or was it through social contact?

A. Well, it was the emergency cases; later on socially.

Q. Now, Doctor, did you practice medicine in the County of Maui? A. No, sir.

Q. Did you ever live on Maui? A. Yes.

Q. When did you live on Maui?

A. I was in the National Guard then, we were transferred to Maui June, 1941.

Q. How long did you stay on Maui?

A. I don't know exactly, I think it was about——

Q. Approximately, Doctor.

A. 1941 to 1942, I think.

Q. Was it about the latter part of 1942 or the middle? A. The early part of 1943.

Q. The early part of 1943? A. Yes.

Q. Now, Doctor, prior to 1941, did you have any interest in any liquor business prior to this Green Mill transaction?

A. Well, there was several of them that came up during this time.

The Court: Now, the question is whether you were [3] in the liquor business before this time?

A. No. I was not.

(Testimony of Fook Hing Tong.)

Q. Now, some time in September, 1941, the early part of 1941, did you have any conversation with the petitioner, Hung Chin Ching, with regard to going in to the liquor business together?

A. You mean in September?

Q. Or prior thereto? A. No. I did not.

Q. You didn't have any. Did you have any conversation with Mr. Ching subsequent to September, 1941, about entering into the liquor business?

A. Yes. I did.

Q. What time was that? What date was that?

A. Well, the latter part of the month, I think.

Q. The latter part of September? A. Yes.

Q. Now, where did you have this conversation with Mr. Ching? A. At my home.

Q. At your home? A. Yes.

Q. And who was present at the time?

A. There was my two brothers, and my father there.

Q. Now, didn't you, Doctor Tong, have any separate conversation with Mr. Ching prior to this conference at your home with your brothers and your father, concerning about entering into business? A. No. [4]

Q. How did it come about that you met with Mr. Ching and your family at your home at the time?

A. Mr. Ching dropped in that evening. We were discussing the purchase of the Green Mill. We heard remarks that it was for sale.

(Testimony of Fook Hing Tong.)

Q. All right, tell the court what took place at that conversation that night.

A. Mr. Ching came in. I guess he was going to take me out or something that night. We asked him if he knew the proprietor of the Green Mill. We wanted to know if it was just a remark or whether it was really for sale. I asked Mr. Ching if he knew Mr. Lum, the proprietor. He said that he knew him, and I told him I would like to go to meet the owner of the place and verify it to know whether it was really for sale or not.

Q. Doctor, it is—this is some time ago, and I ask you this question, let's see if you remember. Do you remember a conversation about the Riverside Grill with Mr. Ching, around September, 1941?

A. Yes. I remember it.

Q. Was that prior to your conversation with your family at your home concerning the Green Mill?

A. No. It was after.

Q. It was after? A. Yes.

Q. How long after?

A. I wouldn't say very long. I think it was three or four days. [5]

Q. Three or four days after? A. Yes.

Q. You are sure?

A. I am sure it was after I contacted the owner. I don't know how many days after. I know I was down here on leave about four or five days. It couldn't be very far—

Q. It was pretty close, is that it? A. Yes.

Q. You feel, or you are sure that it was after?

(Testimony of Fook Hing Tong.)

A. That is the time that I got interested in the purchase.

Q. Weren't you interested in the purchase, prior to the purchase of the Green Mill, of the Motor Coach Cafe?

A. That was approached to me. I wasn't interested in it.

Q. I mean at the time—in other words, there had been previous conversations to you on the liquor business by someone?

A. Yes. I heard remarks about it, call it a purchase, or what not, previous to that, but I wasn't interested in it.

Q. What else was talking about, if anything, at your home between your family and Mr. Ching, besides knowing Mr. Lum?

A. Well, he took us out to see Mr. Lum.

Q. No. Before that, wasn't there any—that was the only thing discussed?

A. We couldn't discuss anything, because we didn't know whether it was really for sale or not.

Q. I see. What happened then?

A. The next thing, Mr. Ching offered to introduce us to the owner.

Q. Well, did Mr. Ching do that? [6]

A. He took us up there.

Q. He took you up to Mr. and Mrs. Lum?

A. Yes, introduced us.

Q. What?

A. He introduced us to Mr. Lum.

Q. And who else was present at the Lum home?

(Testimony of Fook Hing Tong.)

A. Well, there was my father accompanied us along.

Q. All your brothers, were they present?

A. I had a chance acquaintance with Mr. Lum. I knew him. We asked if he was interested in selling his place. We heard that there was a rumor that he wanted to sell, partly social, partly business. We got acquainted with him. In that way he observed the fact that we should see his attorney.

Q. Did he suggest that you see his attorney?

A. Yes, if it was we really meant business, or anything like that.

Q. Was there anything else discussed about price?

A. I think something like \$25,000, plus the inventory.

Q. You don't recall whether the price that he (Lum) asked was \$30,000?

A. No. \$25,000, plus inventory.

Q. That was all that was discussed at the Lum home?

A. That's all, he referred us to his attorney.

Q. What happened next?

A. Next we went back to the house, to my home there.

Q. That means your father, your brothers, and Mr. Ching?

A. And we discussed how we were going to raise that money. I asked Mr. Ching if he wanted to come in, and he said, "Yes. [7] How much?" He

(Testimony of Fook Hing Tong.)

said, "\$3,000." Well, that was the only business nature that was talked; get the money if he wanted to come in. Mr. Ching asked me if I could loan him \$3,000 myself; I would finance him on that. I told him, I said, "Well, your brothers, why don't you ask your brothers if they would finance you?" Why didn't he ask his brothers. Well, he said——

Q. By the way, that was the same night?

A. Yes. That was the same night.

Q. At the time that you called to see Mr. Lum?

A. Oh, that was the early part of the evening.

Q. Was that the next night?

A. No. When we come back from his place.

Q. The same night? A. Yes.

Q. What date was this?

A. I don't know. I remember somewhere around the 24th of September, because I came down to the football game, or something like that. I remember that game. I came down on a five-day pass.

Q. That was when all this took place?

A. It was that evening.

Q. What else took place, if anything?

A. All I can remember now—it is so long ago—is that Mr. Ching had no finances. He was trying to induce me to finance him on the thing. I told him if he wanted to get in, he must take the risk, at least show good faith by putting his money in.

Q. Was this all said to him at the time? [8]

A. I told him—well, subsequently he had been after me all that time until the 12th.

(Testimony of Fook Hing Tong.)

Q. We are just talking about that night. Please try and confine yourself to that.

A. I told him that, I remember, that night.

Q. In other words, you asked Mr. Ching whether he wanted to come into the business? A. Yes.

Q. He said, "Yes"? A. Yes.

Q. And you asked him, "How much?"

A. I asked him, "How much?"

Q. And he said, "\$3,000." A. Yes.

Q. He was to put up \$3,000?

A. He was to put up \$3,000.

Q. That was understood? A. Yes.

Q. Isn't it the fact that you folks had not purchased the business yet?

A. No. We were trying to find the money.

Q. Who was to put up the balance of this \$25,000?

A. Well, there was the balance with the three of us.

Q. What was the understanding?

A. The understanding that we were to put up \$22,000.

Q. \$22,000. Who was to put up the \$22,000?

A. Well, my brothers and myself.

Q. Did you people have an agreement as to how much each [9] was to put up?

A. Yes. We had some kind of an agreement, each to put up as much as he can, that he can collect, borrow, or something like that, to get the \$25,000.

Q. How much were you supposed to put up?

(Testimony of Fook Hing Tong.)

A. Well, it isn't how much I was supposed to, it was how much I had.

Q. Well, how much did you have?

A. Well, about \$10,000.

Q. Now, did your other brother, anyone of them state how much the other had, how much they were going to put in?

A. One brother had \$10,000.

Q. Which brother had \$10,000, Chong Hing Tenn?
A. Chong Hing Tenn.

Q. What about the others?

A. He said that he could raise about \$5,000, \$3,000.

Q. You were supposed to put up—Chong Hing Tenn was supposed to put up \$10,000?

A. The other brother supposed to put up \$5,000. He had \$5,000. He took the rest of the \$3,000.

Q. What took place next after that conversation at your home?

A. All I can remember, Mr. Ching was after me to help finance the \$3,000; wanted me to carry him.

Q. Didn't you go back to Maui?

A. A few days after.

Q. How many days?

A. I had four or five days' leave here. [10]

Q. So, in other words, up to September 29?

A. I can't recall the date definitely.

Q. Did you state that you thought that the meeting was September 24, about?

A. Somewhere around there, yes.

(Testimony of Fook Hing Tong.)

Q. Was that after you had seen the football game, or prior? A. Well, I guess after.

Q. How many days had you been in Honolulu prior to this conversation at the home?

A. I think about three or four days.

Q. Three or four days? A. Yes.

Q. So how many days after this conversation did you stay here?

A. It might be about three days.

Q. You stayed in Honolulu altogether over a week?

A. The 24th was the football game. If I came on that day, I had a five-day leave. It would be about the 29th.

Q. That is why I asked you.

A. I wouldn't be sure of the definite date.

Q. That is what I am trying to see, if you recall, as near as possible, as to whether or not you had arrived at Honolulu prior to the football game on September 24. Do you recall whether you did or not? A. I don't recall that.

Q. Could you have been here, as you stated a little while ago on your examination, that you were here three or four days before this conversation at your home? A. I don't get you. [11]

Q. Well, you stated in this conversation, it was approximately September 24, is that right?

A. Yes.

Q. You also stated that you were in Honolulu three or four days before this conversation took place? A. No.

Q. You were not?

(Testimony of Fook Hing Tong.)

A. I wasn't sure whether I was ahead on that date.

Q. You are not sure whether you were here three or four days before?

A. Or after that time.

Q. Are you sure that you had not gone to Maui after this conversation; gone back to Maui?

A. No. I am sure I had stayed a few days and then I left for Maui.

Q. Would you say one or two days?

A. Maybe.

Q. Was it during those one or two days that you and Mr. Ching went over to see Mr. Wong?

A. It may be one of those two days; two or three days.

Q. Do you recall what the purpose of that trip to Mr. Wong was?

A. Yes. I recall. I recall seeing Mr. Wong.

Q. Do you recall asking Mr. Wong—let me put it this way: Tell us what you recall about the conversation with Mr. Wong?

A. I recall the conversation alone with Mr. Wong.

Q. Alone, you say? [12]

A. Mr. Ching was there, but then on the side I talked to Mr. Wong.

Q. Mr. Ching was with you?

A. He brought me there.

Q. He brought you there? A. Yes.

Q. You were sitting at one of the tables, and you were talking to Mr. Wong on the side?

A. Mr. Ching was doing all the talking, until

(Testimony of Fook Hing Tong.)

I went to the bathroom. I asked Mr. Wong how was the liquor business. I asked him whether it was a good venture or not.

Q. What was Mr. Ching doing all the talking for? What did he talk about to Mr. Wong?

A. He tried to find out whether, tried to find out what or how the liquor business was running. We were just merely social, having a drink there.

Q. You and Mr. Ching were both interested in finding out the same thing, finding out whether the liquor business was profitable?

A. Well, whether it was profitable. At the same time—of course, I didn't know how to handle the business, neither does Mr. Ching, but we want to know how he did it.

Q. Well, you wanted to have Mr. Ching tell something about the liquor business, so that you could become familiar with it?

A. How much headache you have to have, taking care of the people when they get intoxicated, and all that, whether he had much trouble in it or not.

Q. Didn't you and Mr. Ching ask Mr. Wong whether or not [13] he knew of any good liquor business for sale?

A. I don't recall that.

Q. You don't recall that. He might have, or you people might have, and then again you might not, you can't recall?

A. I can't recall.

Q. Then, was it understood—let me put it this way: Did you people purchase the business before you went back to Maui?

(Testimony of Fook Hing Tong.)

A. No. We were still looking for money.

Q. Still looking for money. In other words, not only Ching's money, but your money—your own money; your brother's money; still looking for money?

A. I left so much money deposit there, but we had to find the rest. I just put my \$10,000 in my brother's hands there. They can go along with the business.

Q. In other words, you people had not purchased the business prior to your going back to Maui, that's correct?

A. Well, we made an agreement to buy it. We made some kind of an agreement by Mr. Fong, that we were interested in buying it. Well, you have to put down the money.

Q. Tell me about this agreement with Mr. Fong.

A. I don't know, because I wasn't here. I just left my money in charge of my brothers and left. I didn't know anything about it.

Q. That is why I am asking. Did you people close the deal? In other words, before you went back to Maui, did you close the deal in the purchase of the business?

A. No. The deal wasn't closed yet. [14]

Q. As you state, you people were still looking for the money. In other words, still looking for that \$22,000 on your part, besides Ching's \$3,000?

A. Well, we had all the money, I think. For myself I had \$10,000.

Q. We know about you. You had \$10,000, but

(Testimony of Fook Hing Tong.)

your brothers were looking for the money, too, weren't they?

A. Maybe. I don't know. But that was the down payment, I think. There was something like that. I don't quite recall. The purchaser had to put up the deposit or something like that. I don't recall that. I wasn't there. Whether it was definitely closed, or in the process of being closed, I don't know.

Q. It was understood it was left—all these finance matters—in your brother's hands, Chong Hing, isn't that right?

A. Yes, some time speak to an attorney to take care of.

Q. That was before you left?

A. Before I left.

Q. Now, what was this conversation that you had with the attorney?

A. For the drawing of the papers for the purchase of the place.

Q. Did you people agree on the price?

A. That is what Mr. Lum had agreed on the price.

Q. \$25,000?

A. \$25,000, plus the inventory.

Q. Who was present at this conversation with Mr. Fong, that [15] you had with him?

A. I don't recall who was present.

Q. Was the conversation at Mr. Fong's office?

A. Yes.

Q. Did you go up alone to see him?

(Testimony of Fook Hing Tong.)

A. I don't recall. I just told him we were interested in buying that place there, that he do business with my brother.

Q. Did you sign anything before you left for Maui in Mr. Fong's office, or anywhere else?

A. No. I didn't sign anything.

Q. Now, this option or agreement to purchase, did you sign that?

A. Later on I signed it.

Q. When did you sign it?

A. I think it was after the middle of the month of October.

Q. The middle of October? A. Yes.

Q. Was it about October 10? A. No.

Q. Was it about October 20, when you were registered?

A. It was previous to that. It was around the 15th.

Q. About the 15th of October that you signed the option, agreement to purchase?

A. No. I think it was the purchase.

Q. I didn't hear you.

The Court: "I think it was a purchase."

Q. Oh, it was a purchase? A. Yes.

Q. In other words, there was no option to purchase agreement? [16]

A. I don't know whether you call it an option. You agree to buy and you put so much money down.

Q. When did you put so much money down?

(Testimony of Fook Hing Tong.)

A. I left it up to my brother. I gave him the money. That's all I know about it.

Q. Speaking about the agreement, the thing that you came down to sign——

A. I didn't come down.

Q. Did they send it up to you?

A. It was.

Q. During this time, up to October 15, were you people operating the business at the Green Mill?

A. From what I gather in the first, I think we were supposed to take the business over for trial, for a couple of weeks. I guess the only thing that was holding it up was the transfer of the liquor license.

Q. During that time the inventory was taken?

A. I don't know.

Q. Do you know, Doctor, when the application for the transfer of the liquor license was made?

A. I don't recall.

Q. Do you know when the granting of the transfer of the liquor license was made?

A. Some time during that money. I don't know the exact date.

Q. Do you recall whether or not it was granted October 10, 1941.

A. I don't know. I wasn't here. [17]

Q. Now, did you come back to Honolulu from Maui after this understanding and agreement between your brothers and Mr. Ching on this deal? Did you come back in the month of October?

A. I don't remember. I don't recall that.

(Testimony of Fook Hing Tong.)

Q. Do you recall signing partnership papers with your brother? A. Yes, I do.

Q. Did you sign it before you left Honolulu for Maui?

A. No. I believe I signed it in front of the notary in Maui.

Q. In Maui. Do you recall when you received these papers for partnership?

A. I recall. I don't know the date.

Q. You recall receiving them?

A. I recall receiving them and going to the notary and signing them and what not.

Q. Did you read the articles of partnership?

A. I did.

Q. Did you notice that Mr. Ching's name was left out? A. I know it was left out.

Q. You know it was left out? A. Yes.

Q. It was no surprise to you?

A. No, there was no surprise to me.

Q. How did it come about that you knew that Mr. Ching's name was to be left out?

A. He came up himself, and the telephoned to verify—whether I would carry him over or not; whether I would assure his [18] finances.

Q. You mean that he telephoned you?

A. He telephoned to me and came up himself.

Q. Do you recall that he came up October 21?

A. Well, my recollection is during—on the 12th of October.

Q. The 12th of October? A. Yes.

(Testimony of Fook Hing Tong.)

Q. The partnership agreement was already signed and executed as of October 1, wasn't it?

A. No.

Q. Sure about that?

A. We couldn't do anything, because we didn't know that the liquor license was transferred.

Q. Have you got a copy of that partnership agreement? A. I haven't got it.

Mr. Waddoups: I will undertake to find it.

Mr. Lee: What's that?

Mr. Waddoups: I will undertake to get one.

The Court: We will take a recess at this time.

(Recess.)

Q. Now, Doctor, as I get it, before you left for Maui, you had left \$10,000 with your brother?

A. No. I left it with Kui Hing.

Q. Kui Hing? A. Yes.

Q. Who was supposed to run the business, was it Kui Hing or Ching?

A. Well, Ching was supposed to run it, but I had to leave my [19] money with somebody.

Q. So you left it with Hui Hing? A. Yes.

Q. That was \$10,000? A. \$10,000.

Q. Now, when you left that \$10,000 with Kui Hing, did he have any money of his own?

A. I don't know.

Q. You don't know? A. It is up to him.

Q. This conversation that you had with Hiram Fong, did you or your brother place a deposit on the purchase of this Green Mill with him?

(Testimony of Fook Hing Tong.)

A. What I know, I think he placed the deposit, but I don't know.

Q. You didn't have any part of it?

A. So far as the business on that.

Q. Did you receive a letter from Mr. Ching regarding the misunderstanding that he had with Chong Hing?

A. Yes. I received a letter from him.

Q. Do you recall what that letter was about?

A. It is too far back now. I don't recall.

Q. At the time, do you recall that the substance of that letter was that he wanted to be reassured of his interest in the Green Mill?

A. Not his interest. I think there was something previous to that that I spoke to Mr. Ching. As a friend, I told him to take a look around there and see how business was; to help [20] around in his capacity. I didn't know whether the bar people get intoxicated, or something like that, for him to take a look around there.

Q. So, in other words, one of the reasons for you investing in the business was the fact that Ching was to be connected with the business, isn't that right?

A. If he could come in, if he could pay his way.

Q. Wasn't it very important to you that Ching was in the business also, at the time that you decided to go into the business?

A. In what capacity?

Q. As a partner.

A. He had no money. He had no experience.

(Testimony of Fook Hing Tong.)

Q. I see. Well, now, we are taking the situation back before you decided to buy this place. Don't look at it now, but look at it back at the time.

Mr. Waddoups: What was that question, please?

(Question repeated by the reporter.)

Q. Wasn't it the fact that Ching was to be a partner in the business one of the principal reasons why you decided to go into the purchase of the Green Mill, where before you were not interested in purchasing the Motor Coach Cafe?

A. No. He wasn't the deciding factor in the purchase of the Green Mill.

Q. Very sure of that?

A. I know the gentleman. I am sure.

Q. How did it happen that you didn't go into the Motor Coach Cafe before Ching came into the business? [21]

A. Simply because of the element of finances.

Q. It was just a little before the Green Mill, wasn't it, a few months?

A. I don't recall how previous the Motor Coach was.

Q. Well, at any rate, Doctor, you recall writing a letter to Mr. Ching on October 6, 1941, in response to your letter? A. Yes.

Q. I will show you a letter dated October 6, 1941, mailed from Wailuku, Maui, as on that day. Do you recall writing this letter?

A. Yes. I recall it. Can I read the whole thing?

Q. Yes. Please take your time.

A. I recall it now.

(Testimony of Fook Hing Tong.)

Q. You are also known by the nickname "Bear Tong"? You were a star football player, and you used to be called "Bear," and that is how you signed this name, "Bear"? A. Yes.

Q. These notes are in your handwriting, signed "B"? A. Yes.

Q. In this letter you mentioned you enclosed a copy of a letter which you wrote to Chong Hing?

A. Yes. I don't know whether there is a copy here.

Q. Well, your attorney has it. A. Yes.

Q. You wrote this letter?

A. I wrote that letter after I received his letter. Now I recall what he wrote about.

Q. Do you recall? Will you tell the court what you recall. [22]

A. Well, previous to the letter there, I had spoken to Mr. Ching. Mr. Ching and I were talking, and he told me that he was a little shaky in his department. His job was very precarious. I told him, well, I could let him—he could work for us. In the meantime I told him to go up to the Green Mill and look it over.

Q. When was this conversation that you had with Mr. Ching?

A. It is previous—at the period when I came down here, about the 24th of September.

Q. Was that before the conversation that you had at your home with all the brothers or after?

A. After.

(Testimony of Fook Hing Tong.)

Q. It was, in other words, it was during the one or two days that you were here, after that conversation?

A. I couldn't take him over for the partnership at \$3,000. The next best thing was to give him a position.

Q. Are you sure about that? Is that your recollection?

A. Well, so far as the time element, I am not sure.

Q. You are not sure?

A. But the impression, and the import of that at the time.

Q. There are several things which I want to call your attention to. You testified that you left \$10,000 with your brother Kui Hing. This letter states that you left \$15,000. Which is correct.

A. I think I left \$10,000. \$15,000 is incorrect.

Q. You think that the letter you wrote—the \$15,000 is incorrect, you think it was \$10,000.

A. Yes, \$10,000. [23]

Q. Now, do you recall what salary that Mr. Hung Chin Ching was supposed to receive for his managing or helping manage the business.

A. He went in the capacity as a friend. He wasn't hired. We didn't own the place yet. I told him just go over and take a look, and see what his impression was; represent me.

Q. You just made the statement that so far as you were concerned, Mr. Ching was to have no interest in the business, is that correct.

A. That is my understanding. I told him di-

(Testimony of Fook Hing Tong.)

rectly he had no money to put in, I couldn't put him in as a partner or anything. I wouldn't stand for the financing.

Q. That was one or two days after the conversation at your home? A. Yes.

Q. Now, I call your attention to this fact in your letter, and I will read it briefly—the particular points I call your attention to: “Received your letter this noon and was glad to hear from you but I am very sorry to hear that my brothers are giving you a hell of a lot of trouble on this damn business.”

Mr. Waddoups: May I suggest that you have the letter identified by an exhibit number, so that——

Mr. Lee: Very well. I would be very glad to. Could these be identified? There are two of them together. They are petitioner's exhibits.

The Court: All right, the letter dated 10/6/41——

Mr. Lee: October 6, 1941.

The Court: ——would be Petitioner's Exhibit A for identification, and the copy of the enclosure will be Exhibit [24] A-1.

(The documents heretofore referred to were marked Petitioner's Exhibit A, and A-1 for identification.)

Q. In Petitioner's Exhibit A, for identification, I will read this portion for your attention: “Hello HC: Received your letter this noon and was glad to hear from you but I am very sorry to hear that

(Testimony of Fook Hing Tong.)

my brothers are giving you a hell of a lot of trouble on this damn business. Don't be surprised that I expected that and was very reluctant to let things go as it is. Anyway, I guess since I am the heaviest stockholder and I know that you were instrumental in getting the business for us I feel that it would be okeh as long as you were able to take the business and manage it. I know that I wouldn't put \$15,000 for nothing, knowing that it is a gold mine, but hell, if you ditch the place there won't be any of that money that I will ever smell. I know those brothers of mine, and that is one reason why I didn't back them up the last time when they wanted the Motor Coach Cafe. Now the trouble is up again.

"Here is the proposition, as was stated verbally that you handled the personnel and that you also take care of my interest there. I have 15 shares and you have 3, that is if you get the dong by then. Really I am damn sorry this thing came up as I am in the army and can't get out at random and I am just tied down here. I wouldn't buy the place if you did not have the job of managing the place. Okeh now you tell my brother that you are representing me and if he doesn't like it he can return the \$15,000 and I will pull out and if not I will try and buy him out. So hold the contract and let Hiram Fong know that I want my share in that business and not to put [25] his name in the whole shee bang. I am sorry to hear of that crap about my brothers but I didn't know that it was that

(Testimony of Fook Hing Tong.)

bad.” * * * Well, it goes on, and in the end you say: “I am going to write him now and tell him to learn the bloody business before he starts to think of something else or let me have my \$15,000 back. Better put it in black and white and tell Long John to hold”—

Q. Is that Mr. Lum? A. Yes.

Mr. Lee (Continuing): “out consummating the business. Aloha. Bear.”

Q. You wrote this letter?

A. Evidently, I did.

Mr. Lee: I will ask that these exhibits be received in evidence.

Mr. Waddoups: No objection, your Honor.

The Court: They will be received in evidence and retain the same marking.

(The documents, heretofore marked for identification, Petitioner’s Exhibit A, and A-1, were received in evidence.)

PETITIONER’S EXHIBIT A

Wailuku, Maui, 10/6/41

Hello HC

Received your letter this noon and was glad to hear from you but I am very sorry to hear that my brothers are giving you a hell of a lot of trouble on this damn business. Dont be sueprised that I expected that and was very reluctant to let things go as it is. Any way I guess since I am the heaviest stock holder and I know that you were instrumental

(Testimony of Fook Hing Tong.)

in getting the business for us I feel that it would be okeh as long as you were able to take the business and manage it. I know that I wouldnt put 15000 dollars for nothing knowing that it is a gold mine but hell if you ditch the place there wont be any of that money that I will ever smell. I know those brothers of mine and that is one reason why I didn't back them up the last time when they wanted the Motorcoach cafe. Now the trouble id up again.

Here is the proposition, as was stated verbally that you handled the personell and that you also take care of my interest there. I have 15 shares and you have three, that is if you get the dong by then, Really I am damn sorry this thing came up as I am in the army and cant get out at random and I am just tied down here. I wouldnt buy the place if you did not have the job of managing the place. Okeh now you tell my brother that you are representing me and if he doesnt like it he can return the 15000 and I will pull out and if not I will try and buy him out. So hold the contract and let Hiram Fong know that I want my share in that business and not to put his name in the whole shee bang, I am sorry to hear from of that crap about my brothers but I didnt know that it was that bad.

So much HC as I am very busy and am going to write to those fellows a letter and tell them that I intended for you to handle the business as I have all the confidence ib you and that I would not have put the money out if I was to learned that you were

(Testimony of Fook Hing Tong.)

not there to handle it. I know for a fact that they do not thoroly know the hoomalimali game, the banana oil stuff. So much. Tell Dee Hing to take his face out of the place or throw him out as he has nothing in there. As for Kui Hing he is a weak sister and I am disappointed in that guy. So you see you are he big cheese there. Please check the cash too with them and keep tract of the whole affair. I hereby appoint you to take charge of my interests there.

I am going to write him now and tell him to learn the bloody business before he starts to think of something else, or let me have my 15000 thousand back. Better put it in Black and white and tell Long John to hold out consumating the business. Ahola Bear.

(In pencil): Copy of letter that I wrote Chong—They got excited when they see plenty of people & dough. Small town guys Ching—so be tolerant & patient. Do it for my sake.

/s/ B

[Envelope]

Postmark: Wailuku, Hawaii, Oct. 6, 3 p.m., 1941.

Addressed to: Mr. H. C. Ching
Nuuanu Y.M.C.A.
Honolulu, T.H.

Filed June 21, 1948, Circuit Court, T. H.

Filed Oct. 12, 1948, Supreme Court, T. H.

(Testimony of Fook Hing Tong.)

PETITIONER'S EXHIBIT A-1

Wailuku Maui, 10/6/41

Dear Brother:-

I have received word that you are not holding your end of the bargain as agreed upon by the whole family. We talked it over and now I find out that you are trying to run everything your way. Please understand that I have HC ching there to look out after my interests and and that your position was to take care of the finances and the monetary end. You and he are the sole administrators there and that you take care of the above and that Ching handles the personell. I am acquainted with HC Ching and to be frank I would not put up the money if it had not being for the fact that Ching was instrumental in getting the business for us and further let us be frank that if Ching is not there, I would like you to buy me out. I did not finance you the last time on the Motor Coach cafe, knowing that you have plenty to learn about business, and I repeat that if HC Ching was not helping to handle this business I would not go in. So that is my intention that you abide by what was consummated at the verbal conversation held at home. If you think you can handle the place by yourself you can have my intere shares but I cannot afford to spare that much cash for you to promote any business. I hope this makes it plain to you what my sentiments are. Sometimes too much money and being too busy yets into a fellow's head and he gets all excited. Tell

(Testimony of Fook Hing Tong.)

Dick to stay away from there and not meddle around too much with the waitresses or the personnel. Also he has no onterest there. If things keep up as it is, we will be on the rocks. I want to be frank and I dont want to hurt anyone's feelings, but let me tell you that I know you have no experience in that kind of business which is a hoomalimali game, a hand-shaking game, where the customer is always right and where you have a put on a smile whether you like it or not. Our fmily dont know that, they are too damn sensitive and try to play big shot. I am leaving it up to you to carry out orders as was stated in our discussion. For Gods Sake you have more han you can handle now, and dont go into any more promotions without thinking things over or letting me know. I have enough money at stake and I dont care to have you gamble the thing away on wild cat schemes and ideas. At least you dont give a damn to tell me or write me a letter about the whole business, and all you think is yourself. I am almost sorry that I got into this affair. So get down to business and work together. Study your business well, while you have the chance to be taught. The idea is to make the money regardless whether you are the janitor or what they they call you. That is business ans this is not the little Jerk water town of Kohala where you know eevry tom Dick and Harry. Get wise to yourself and the less member of the family hand around the better for the business. I dont think anyone should be around

(Testimony of Fook Hing Tong.)

around there eexcept you and Ching. Too many bosses spoil the soup. Adn dont get too suspicious of the other guy. Please dont make me regret that I had a hand in this affair and I am getting worried. Take your time and be cool, dont get excited when you see so many people and have ching around to help you if he has to put out more time, he will do it gladly, but in this game the main attitude towards the success is playing ball with the other fellow. I am sending a copy of this letter to Ching so that he will know that he is there to look after my interest. I cant get out and come down but I am worried that you people will screw up the works. So much.

YOUR BROTHER.

Filed June 21, 1948, Circuit Court, T. H.

Filed Oct. 12, 1948, Supreme Court, T. H.

Q. Now, Doctor Tong, why did you write that you had put in \$15,000 when you had actually put in \$10,000?

A. Because I forgot I had—I didn't have that much.

Mr. Lee: If your Honor please, I just noticed one of the witnesses has been here ten or fifteen minutes. I will ask that he be excused.

The Court: All witnesses but the parties to the action will remain out of the hearing of the court. [26]

(Testimony of Fook Hing Tong.)

Q. Were you supposed to put up \$15,000 on it?

A. I was supposed to put up that if I had \$3,000 from Mr. Ching.

Q. You were supposed to put it up for Mr. Ching, put his \$3,000 up?

A. Yes. He was taking my shares from me. I was supposed to give him from my share. The others had taken up——

Q. The others had taken up the other \$10,000?

A. I was supposed to take my ten.

Q. I don't understand you, Doctor. You were supposed to put up \$15,000. A. Yes.

Q. As part of your contribution to this capital?

A. Yes.

Q. Is that correct? A. Yes.

Q. Now, who was supposed to put us the other \$10,000?

A. I wasn't supposed to put up \$15,000. I couldn't take \$15,000. I took \$10,000. That's all I pay. Out of that ten, if Mr. Ching wanted to come in, he would take three of that.

Q. You take twelve, instead of fifteen?

A. Seven.

Q. Oh, seven. Who was supposed to put up the other \$15,000? A. The other brothers.

Q. Didn't you tell the court that \$10,000 that you deposited with Kui Hing was supposed to be the down payment for the business?

A. That was the first money that there was there. [27]

(Testimony of Fook Hing Tong.)

Q. That was the only money that was there?

A. I don't know.

Q. Really, don't you know, Doctor, that you were the capitalist of the family, so far as that is concerned, you had the money?

A. I had cash, but I am not a capitalist.

Q. Well, all right. I will take that term back, Doctor, but wasn't your \$10,000 used as a down payment for the purchase price?

A. I don't know. I just gave it to my brother to handle it.

Q. Didn't you know that your brothers didn't put up a nickel at the time, just as much as Hung Chin Chong didn't put up a nickel at the time?

A. I don't know.

Q. Isn't it a fact that even after the deal was consummated, October 10, approximately, 1941—you say about October 15—that the rest of the purchase price was agreed to be paid at \$1,000 a month out of the profits of the business?

A. The purchase price? No. That was—I think it was the inventory.

Q. Let me ask you this question: Do you know whether or not when the deal was consummated, whether or not Mr. Lum was paid more than \$10,000 as a down payment for the business, with the balance to be paid at \$1,000 a month?

A. All I know is that the purchase price was \$25,000, that had to be paid accordingly, and the inventory was to be paid at a \$1,000 a month.

Q. The inventory was paid at \$1,000——[28]

(Testimony of Fook Hing Tong.)

A. The purchase price was \$25,000.

Q. Let me ask you this question: This sale was consummated, so I got it, \$25,000 was paid to Mr. Lum?

A. That's right.

Q. Are you sure about that?

A. Positive, or else he would not turn the business over.

Q. How much was the inventory?

A. I don't know. All I know is that it was \$4,000 or \$5,000, because I had assumed \$5,000 of that, when the blitz came.

Q. You assumed the inventory, paying for the inventory?

A. The blitz came and I couldn't keep up the \$1,000 a month. Mr. Fong wrote me a letter, and I told him I was assuming that \$5,000. That's all I know.

Q. You know the inventory was more than \$5,000?

A. More than \$5,000?

Q. About \$15,000, wasn't it?

A. I don't know.

Q. Well, you people were operating the business during the months of October, November and December, that was before the blitz?

A. Yes.

Q. Weren't you people paying Mr. Lum from the profits of the business on this purchase price?

A. I guess so.

Q. Wasn't this business virtually a gold mine, as you stated in your letter?

A. Well, I gathered that from the expressions, what I wrote, of what people say, a "gold mine."

(Testimony of Fook Hing Tong.)

So I think maybe it is a [29] gold mine. I don't know. I wasn't in that business myself, ever. I only surmise from hearsay.

Q. Well, in fact, as it turned out, it was a gold mine?
A. Well, not during the blitz time.

Q. I am talking about the thing up there during the war? It was a money mill, wasn't it, actually there?

A. I don't think so, compared with others. Everything was the same.

Q. Can you tell me or do you recall what your business was during the years 1942 to 1945?

A. I don't have the exact figures.

Q. Approximately?

A. My share of it was—the only time I remember getting the figures coming to me was in the first three months, was \$2,000.

Q. As your share?
A. That is my share.

Q. Do you know what your brothers got?

A. I couldn't remember the figures now.

Q. Who keeps your books?

A. We have a bookkeeper.

Q. What is his name?
A. Wallace Aoki.

Q. Where is his office?

A. I think part time he works at the Hawaiian Meat Company.

Q. Do you people keep records of your books at one of your brother's office, or at the Green Mill? Or is it Mr. Aoki?
A. Mr. Aoki.

Q. You people don't have records of your [30] own?

(Testimony of Fook Hing Tong.)

A. All the records—no. I don't have any.

Q. Do you know at the time whether or not—
at the time of closing this deal, as you stated October 15, 1941, whether or not either one of your brothers had put in any cash of their own?

A. I know that they were waiting for the cash to come down, to be transferred.

Q. What cash?

A. A check from the Bank of Hawaii, from Hawaii, Kohala.

Q. Both brothers?

A. Well, the other brother there—I think he has his own money. I don't know.

Q. Let's stop——

A. Chong Hing was waiting for a check. I don't know whether he was making a loan from the Bank of Hawaii, Kohala branch, or he had assets. I don't know where he got it.

Q. How much was the loan that he was going to make? A. \$10,000.

Q. Did he have any assets upon which he could give the bank security for that loan?

A. He had stocks, something like that. I don't know.

Q. You don't know?

A. No. Well, he told me that he had stocks amounting to that.

Q. What about Kui, where was he going to get his money?

A. That's up to him. I don't know. He started practising in 1928. If he can't have \$5,000 to his

(Testimony of Fook Hing Tong.)

credit, or couldn't make a loan of \$5,000, why—— [31]

Q. But as of October 15, 1941, they didn't put up a nickel in cash, did they, except from what they were supposed to put in as capital?

A. I think it was around the 11th, wasn't it, it was consummated,—the business was closed, or something like that.

Q. Actually the business was closed as of October 10th. A. Closed October 10th.

Q. At the time they didn't put up the cash,—any money? A. How can they,——

Q. I am not asking you that. I am asking you whether or not you knew whether or not they put in a nickel in the business?

A. Sure they put it in.

Q. Did you put in another other amount of capital contribution in to the business?

A. Yes, the rest of the \$25,000.

Q. Well, there was,—you put in \$10,000?

A. Yes.

Q. Who put,—how was the fifteen put up?

A. By the two of them.

Q. Who put up ten, and who put up five?

A. Chong Hing put up \$10,000; the other \$5,000.

Q. Isn't it a matter of fact, that Chong Hing was handling the finances of the Green Mill prior to the closing of this deal, October 11, 1941, as you say? A. I don't know.

Q. You don't know that?

A. I was in Maui, I don't know.

(Testimony of Fook Hing Tong.)

Q. Who was supposed to handle the money that was coming in [32] from the Green Mill? Who took charge of the money?

A. Well, the seller was there, too. We were the buyers. I think it was completely transferred.

Q. As a matter of fact, the seller wasn't there, the seller was in bed, wasn't he? He was a sick man?

A. Well, I don't know. He came down there.

Q. Isn't it a fact that his bookkeeper came, Dai Ching, and he was looking after the seller's interest, and he took the inventory with Chong Hing and Mr. Ching?

A. You are asking me something,—I wasn't there.

Q. If you don't know, say you don't know.

A. I don't know.

Q. What I want to know from you is when you left the \$10,000 in Kui Hing's hands, there must have been some arrangement as to who was going to handle the cash that was rolling in on the sales record at the Green Mill. Certainly it wasn't Mr. Ching, was it? A. I don't think so.

Q. Who was supposed to handle the cash?

A. That's what I say, either my brother or the seller, on the consummation of the business.

Q. Doctor, you don't know, as a matter of fact, as I gather, whether or not your two other brothers got \$15,000 out of the Green Mill to put in as their capital?

A. I know for a fact that they had the money.

(Testimony of Fook Hing Tong.)

Q. Do you know whether or not, as a matter of fact, that the loan of Chong Hing with the bank came through?

A. I think there was a certified check to that account.

Q. Do you recall what the date was that Chong Hing got [33] that certified check?

A. No. I don't. Some time in the month of October.

Q. Was it prior to October 10th or October 11th, or subsequent thereto? A. Prior.

Q. Isn't it a matter of fact for the years 1942, 1943, 1944, 1945 and 1946, that the average gross annual income of the business was approximately \$150,000?

Mr. Waddoups: I object to that, your Honor, at this point in the proceedings, as incompetent, irrelevant and immaterial; until there has been established an interest in this business on the part of the petitioner, it is not material what the income was. As a matter of proof now, he had absolutely no interest in it, an accounting does not follow until it is shown that he does.

Mr. Lee: If your Honor please, I would like to state that the whole basis of the suit is based on the fact in the arranging of the purchase of the business, that by the action of the respondents themselves were the recipients of so much money coming into this mill, this money mill, that they took this action in breach of their oral agreement.

The Court: Objection sustained insofar as it

(Testimony of Fook Hing Tong.)

goes past 1942. We are interested in the situation at the time, not in 1946.

Mr. Lee: Very well, your Honor.

Q. Do you recall, Doctor, just for the months of October and November, two months, that there was a gross income of \$20,000 for 1941, if you know?

A. I don't know, except the dividend check. [34]

The Court: Is that the dividend check the first two months was \$2,000?

A. Yes.

Mr. Lee: I have no further questions, for the time being.

Mr. Waddoups: I have no questions at this time, your Honor.

The Court: Very well. Call your next witness.

Mr. Waddoups: May I ask one question?

Cross-Examination

By Mr. Waddoups:

Q. Doctor Tong, Mr. Ching came over to Maui to see you, did he not? A. Yes.

Q. Some time about the time when you were about ready to close this partnership deal?

A. Yes, sometime around there. I remember the fair coming up.

Q. Had he called you from Honolulu before he came up? A. Yes. He did.

Q. That call was made from Mr. Fong's office?

A. Yes. It was made from there.

Q. At the time did you advise Mr. Ching or tell

(Testimony of Fook Hing Tong.)

him anything as to whether or not he had a share of this business?

A. Yes. He asked me if he was in or out. I told him if he had the money. He had never given me any assurance of anything in the way of cash. The \$3,000 he wanted me to finance. I wouldn't finance him. [35]

Q. Did you at the time tell him that you entered into a partnership with your brothers?

A. Yes. I did.

Q. Did he know about that proposed partnership to his exclusion prior to the time that you entered into that agreement with your brothers?

A. I don't understand.

Q. Did he know that you and your brothers were going to form a partnership before you did actually form it, before you actually signed the papers?

A. Yes.

Q. I call your attention to a document dated October 14, 1941, calling particular attention to the signatures which appear on the third page thereof, and ask you to examine it and see whether,—see if you recognize that instrument?

A. I recognize my name in it, my signature.

Q. Will you glance through the instrument and see if you recall that as being the partnership agreement which you entered into with your brothers?

A. Yes. I recall this.

Q. And calling your attention to the last page, where the notarial seal shows it was executed by you on the 16th of October, 1941.

A. Yes.

(Testimony of Fook Hing Tong.)

Q. Was that before or after Mr. Ching had come to Maui that you signed this? A. After.

Q. And he had come over there, and you had told him that he had not put up the money, so he was not in, is that [36] correct? A. Yes.

Mr. Waddoups: We offer this in evidence.

Mr. Lee: No objection.

The Court: It will be received in evidence and marked Respondents' Exhibit 1.

(The document heretofore referred to was marked Respondents' Exhibit 1, and received in evidence.)

RESPONDENTS' EXHIBIT No. 1

This Agreement of Copartnership, made and entered into this 14th day of October, A.D. 1941, at Honolulu, City and County of Honolulu, Territory of Hawaii, by and between Kui Hing Tenn, Chong Hing Tenn, and Fook Hing Tong, all of Honolulu, City and County and Territory aforesaid,

Witnesseth:

That the parties hereto, having utmost confidence, faith and trust in one another, make this partnership agreement on the following terms and conditions, viz.:

1. That the partnership shall be for the carrying on of a restaurant and liquor business;

2. That the partnership shall begin on the 1st

(Testimony of Fook Hing Tong.)

day of October, 1941, and shall continue indefinitely until dissolved by operation of law or by common consent of the parties hereto;

3. That the said partnership shall be conducted and carried on under the partnership name, style and firm of "Green Mill Cafe";

4. That the place of business of said partnership shall be at 1111 Bethel Street, Honolulu, Hawaii;

5. That the capital of said partnership shall consist of the sum of Twenty-Five Thousand Dollars (\$25,000), Ten Thousand Dollars (\$10,000) of which has been paid in by Chong Hing Tenn, Five Thousand Dollars (\$5,000) by Kui Hing Tenn, and Ten Thousand Dollars (\$10,000) by Fook Hing Tong;

6. That the parties herein shall from time to time agree among themselves as to what the salary of the partner contributing his services to said business shall be;

7. That there shall be an accounting of the business at the end of every year and the profit realized shall be divided equally;

8. That losses in the partnership shall be borne in proportion to their contributive shares;

9. That whatever properties of the partnership shall not be employed in any other than the partnership business;

(Testimony of Fook Hing 'Tong.)

10. That Chong Hing Tenn shall be the "Treasurer" of said partnership and shall have the exclusive charge of all the financial details of the partnership, including the receiving and collecting of all moneys due the partnership and the paying out and disbursement of all moneys due from the partnership to others;

11. That books of account shall be kept by said Treasurer and entries made therein of all moneys, goods, effects, debts, sales, purchases, receipts, payments and all other transactions of the said partnership. Said books of account, together with all bonds, notes, bills, letters, and other rights belonging to the said partnership shall be carried on, and shall at all times be open to the examination of the other partner. Said books shall be kept in the exclusive custody of said Treasurer, and all partnership moneys received from any and all sources shall be deposited by the said Treasurer in the name of the partnership.

12. That no one of the partners, during the continuance of this partnership, shall assume any liability for anyone whatsoever, by means of indorsement or of becoming guarantor or surety, without first obtaining the consent of the other partners in writing;

13. That any provision hereinabove however expressed, may be varied or waived or abandoned by the consent of the partners in writing.

(Testimony of Fook Hing Tong.)

In Witness Whereof, the said Kui Hing Tenn, Chong Hing Tenn and Fook Hing Tong have hereunto set their hands the day and year first above written.

/s/ KUI HING TENN,

/s/ CHONG HING TENN,

/s/ FOOK HING TONG.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 14th day of October, A.D. 1941, before me personally appeared Kui Hing Tenn and Chong Hing Tenn, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[Seal] /s/ ELEANOR YOUNG LUM,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission expires June 30, 1945.

Received in evidence, June 21, 1948, Circuit Court
T. H.

Filed Oct. 12, 1948, Supreme Court T. H.

Q. Was there anyone else on this conference in Maui with Mr. Ching besides yourself?

(Testimony of Fook Hing Tong.)

A. Well, at the time I was entertaining another friend of mine.

Q. And who was that? A. A Mr.——

Q. He was there at the time that you talked to Mr. Ching?

A. He was there on two occasions.

Mr. Waddoups: I think that's all.

Redirect Examination

By Mr. Lee:

Q. You just stated something here that you talked with Mr. Ching after you had signed the articles of partnership, on Maui? A. Before.

Q. Before. Sure about that?

A. I am positive. I was there on the 12th, because it was the last day of the fair. I think the fair that year ends the 12th, or something like that. That is how I remember the date.

Q. Wasn't it October 20th that you talked with him by [37] radiophone, that he called you from Hiram Fong's office?

A. The night previous,—the day previous to the day of arrival.

Q. When was that arrival?

A. I believe it was October 12th.

Mr. Lee: October 12th. No further questions.

Mr. Waddoups: You may step down.

(Witness excused.)

The Court: Next Witness.

CHONG HING TENN

a respondent herein, called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lee:

Q. What is your name, please?

A. Chong Hing Tenn.

Q. Are you the person named as one of the respondents in this case? A. Yes.

Q. You are one of the three brothers here?

A. Yes.

Q. Kui Hing Tenn and Fook Hing Tong,—you are Chong Hing? A. Yes.

Q. Chong Hing. You know Mr. Hung Chin Ching?

A. Yes. I don't know him real well, just met him through my brother.

Q. Your brother, Fook Hing Tong?

A. Yes. [38]

Q. When was the first time that you met Mr. Ching? A. I don't remember.

Q. Was it about that time that the doctor testified that you were in court, at your father's home?

The Court: In conference, not in court.

Mr. Lee: Pardon me, your Honor.

Q. At your father's home?

A. When I came down that day that was the first day I met him, when I came down from the country.

Q. At your father's home? A. Yes.

(Testimony of Chong Hing Tenn.)

Q. How at the time, where were you residing, in Honolulu? A. Before?

Q. Before that time?

A. Up in the country.

Q. What country? A. Hawaii.

Q. What part of Hawaii? A. Kohala.

Q. You were from Kohala, Hawaii, that is?

A. Yes.

Q. That is where all your brothers were born, isn't that right? A. Yes.

Q. Had you ever done business in Honolulu prior to that time?

A. What kind of business?

The Court: Were you ever in business here?

A. No. No business at the time.

Q. Were you ever in business in Kohala? [39]

A. Yes.

Q. What kind of business?

A. Well, I have a little store, and bar.

Q. Selling liquor? A. Yes.

Q. When did you come to Honolulu?

A. 1941, around September. I don't remember exactly.

Q. It was about that time?

A. About that time.

Q. Did you ever try to influence your brother, Fook Hing Tong in the purchase of the Motor Coach Cafe prior to that time? A. Yes.

Q. What month was that?

A. September.

Q. About the same time? A. Yes.

(Testimony of Chong Hing Tenn.)

Q. The Motor Coach Cafe was for sale, wasn't it?

A. The Motor Coach, that was before that. We are talking about the Green Mill.

Q. I am talking about the Motor Coach.

A. The Motor Coach?

Q. The one on Hotel street.

A. Not September. That was before.

Q. Well, how much before?

A. I don't know.

Q. Was it in 1941? A. 1940, I think.

Q. The latter part of 1940, or the early [40] part? A. I don't remember.

Q. Well, at any rate, it was in 1940, is that correct? A. Yes.

Q. At the time did you have any money of your own to purchase the Motor Coach Cafe?

A. My own?

Q. Pardon? A. Not very much.

Q. How much was the Motor Coach Cafe, if it was for sale? A. I don't remember.

Q. Anyway, you didn't have the money to buy it, is that correct?

Mr. Waddoups: Counsel is going to tie this up to something?

Mr. Lee: Yes.

Mr. Waddoups: I don't see the materiality of it at all, in this issue. I realize that this is an equity proceeding, and we want to give,—

The Court: He says he will tie it up. It will be received, subject to a motion.

(Testimony of Chong Hing Tenn.)

Q. Did you ask your brother Fook to put the money up for the Motor Coach Cafe?

A. He was talking about buying it. We had to raise the money to buy it. We couldn't buy it, and we dropped the matter.

Q. He told you he was not interested?

A. Yes.

Q. Now, on this Green Mill. In September, 1941, who called the conference at your father's home? [41]

A. I talked to my brother.

Q. You talked to Fook Hing? A. Yes.

Q. Did you talk during the day, or in the evening? A. In the evening.

Q. Who was present at the time?

A. Well, he and I.

Q. Just you and he?

A. Later the three brothers was,—the family is around there. I don't know whether they heard the conversation, or not.

Q. You are talking about this,—

A. We knew that the Green Mill was offered for sale.

Q. Who said that? A. I asked them.

Q. You told them that the Green Mill was for sale? A. Yes.

Q. How did you know that?

A. I heard it on the street.

Q. Do you recall who you heard it from?

A. Yes. Albert Lee.

Q. Albert Lee? A. Yes.

Q. Is that the Albert Lee on King Street?

(Testimony of Chong Hing Tenn.)

A. Yes. Sure.

Q. What did you folks talk about?

A. If that is so, we better check up if we are interested. We said,—— [42]

Q. What did your brothers say?

A. Well, find out if it is for sale, do a little more checking before we check into it.

Q. Then Mr. Ching wasn't there at the time, was he?

A. Well, he came in later on. I don't remember what time.

Q. Later on, that same evening?

A. I don't remember if it was the same evening or not.

Q. You don't remember whether it was the same evening?

A. No, sir.

Q. Or was it the following evening?

A. It may be the following evening, or before. He drops in occasionally, always. I don't know what for.

Q. You don't know what for. You don't know what he comes for over to your place?

A. He is good friend.

Q. With the doctor?

A. He goes with him, but in his business, I don't know what he come in, for that business.

Q. Well, Mr. Ching used to drop around the place whenever your brother Fook Hing comes into town; they go,—they go out together, is that right?

A. I think so.

Q. You don't know whether it is the same eve-

(Testimony of Chong Hing Tenn.)

ning, or the following evening. At any rate, that Mr. Ching came over, did he, one day in September, and had a conversation about the purchase of the Green Mill?

A. He didn't discuss with me. We discussed it, and my brother talked with him. I don't remember. [43]

Q. At this conversation at your home, where Ching was present, do you recall what the conversation was about?

A. With my brothers, about buying the Green Mill, for sale.

Q. Do you recall what the agreement was between or among you concerning how much each was to put in the partnership?

A. The purchase price was \$25,000. My brother take ten, I take ten, and I take five.

Q. Where did Mr. Ching come into the picture, if he came in at all?

A. I don't know about him. I didn't do business with him.

Q. Did your brother Fook Hing?

A. Maybe he did; not with me.

Q. Do you recall when all of you went to see Mr. Lum at his home?

A. I don't remember what day it was. I recall just one time.

Q. Was Mr. Ching present with you people, with your brothers? A. Yes. He took us up there.

Q. He took your people up there?

(Testimony of Chong Hing Tenn.)

A. Yes.

Q. At the time was the matter of price agreed upon with Mr. Lum for the sale of the business?

A. The price? We were asking if it was for sale. He had to take it up with his lawyer.

Q. There was nothing said about \$30,000 or \$25,000? A. I remember \$25,000.

Q. Mr. Lum said that he wanted \$25,000?

A. Yes.

Q. And do you remember whether or not you offered Mr. Lum [44] \$200 for an option, contract of purchase? A. I guess,—I think so, yes.

Q. Well, you did it, didn't you? You made him an offer to put \$200 down to bind the deal?

A. Yes. I think so.

Q. Mr. Lum refused, saying he was an honorable gentleman, and he knew Mr. Ching here, also an honorable gentleman, and his word was his bond?

A. I don't remember that he said it. He said it was not necessary, because he was going to see Hiram Fong.

Q. In other words, he would not take your check? A. Not necessary, he said.

Q. Then did you see Hiram Fong?

A. Lum did. Fong represented Lum.

Q. Did you have any conversation with Mr. Fong on the deal?

A. No. You mean the first day?

Q. No. The next day. A. Before that?

Q. After that?

A. After that we had something about drawing up a partnership and a bill of sale or something,

(Testimony of Chong Hing Tenn.)

transferring the license on that. He left that in the attorney's hands.

Q. Mr. Fong was representing Mr. Lum?

A. Yes.

Q. Is that correct? A. I presume so.

Q. You also had him arrange to represent you people at [45] the Liquor Commission, to have the license transferred?

A. Yes. He handled the transfer.

Q. He was representing both parties with each other's consent, is that right? A. Yes.

Q. And he drew up the articles of partnership?

A. Yes.

Q. Among the brothers? A. Yes.

Q. Now, do you remember when the application for the transfer of the liquor license was made by Lum?

A. I don't remember the date. I think some of these letters show what date it was transferred.

Q. Do you remember that the date was on October 1st, that the application was made?

A. I don't remember what date.

Q. Do you remember that it was October 10th that the Liquor Commission consented to the transfer of the liquor license?

A. It has been so long, I don't know. I think if you will look in the correspondence.

Q. I will show you here a letter, addressed to Mr. Hiram Fong, stating that the Liquor Commission was granting the liquor license October 10, 1941. You have seen this letter before?

(Testimony of Chong Hing Tenn.)

A. I never seen this letter.

Mr. Lee: I don't think there is any dispute.

Mr. Waddoups: No dispute about it, Mr. Lee.

Mr. Lee: By agreement, may we have this offered? [46]

Mr. Waddoups: No objection.

The Court: This letter is dated what?

Mr. Lee: October 11th, your Honor.

The Court: 1941.

Mr. Lee: Yes.

The Court: The Liquor Commission to Hiram Fong. This will be Petitioner's Exhibit B.

(The document heretofore referred to was marked Petitioner's Exhibit B, and received in evidence.)

PETITIONER'S EXHIBIT B

Liquor Commission of the
City and County of Honolulu
Honolulu, Hawaii

October 11, 1941.

Hiram L. Fong, Esquire
Attorney at Law
77 Merchant Street
Honolulu, Hawaii.

Dear Sir:

Replying to your communication of October 6, 1941, submitted on behalf of Mrs. Elsie Young Lum, d/b/a "Green Mill Cafe," 1111 Bethel Street requesting that she be permitted to transfer her Dis-

(Testimony of Chong Hing Tenn.)

penser General liquor license to Messrs. Chong Hing Tenn, Fook Hing Tong and Kui Hing Tong, by direction of the Liquor Commission, please be advised that at a meeting held on October 10, 1941, said request was granted.

Kindly present at this office notarized copy of Bill of Sale, certificate of co-partnership, tax clearances of the transferees, Industrial Accident Board Clearance, as also the license in order that the proper endorsement may be made thereon.

Very truly yours,

LIQUOR COMMISSION OF THE CITY AND
COUNTY OF HONOLULU,

By /s/ RAYMOND IRWIN,
Secretary.

Filed June 21, 1948, Circuit Court T. H.

Filed Oct. 12, 1948, Supreme Court T. H.

Q. I will show you a document which purports to be a bill of sale from Elsie Lum, owner of the Green Mill, to your brothers. Do you recall having seen this document before?

A. I am not sure.

Q. You aren't sure?

A. Fong kept all the records; he told me everything o.k.

Q. I notice that this bill of sale was October 20,

(Testimony of Chong Hing Tenn.)

1941, was that the date that the money was turned over, or previous to that?

A. I guess so. If you don't turn in the money, you couldn't get a sale.

Q. I am asking you whether you know?

A. I'm not sure. It must be. He is waiting for the money before he signed the document.

Mr. Lee: If your Honor please, I will ask that this bill of sale be received in evidence.

Mr. Waddoups: No objection.

The Court: Petitioner's Exhibit C.

(The document heretofore referred to was marked Petitioner's Exhibit C and received in evidence.) [47]

PETITIONER'S EXHIBIT C

Indenture made this 20th day of October, A.D. 1941, by and between Elsie Young Lum, of Honolulu, City and County of Honolulu, Territory of Hawaii, party of the first part and Vendor, and Chong Hing Tenn, Kui Hing Tenn and Fook Hing Tong, all of the same place, parties of the second part and Purchasers,

Witnesseth:

That for and in consideration of the sum of Ten Dollars (\$10.00) and other valuable consideration in hand paid by the Purchasers to the Vendor, the full receipt whereof is hereby acknowledged, the Vendor does hereby sell, assign, transfer and set

(Testimony of Chong Hing Tenn.)

over unto the Purchasers, their administrators and assigns, all her, the Vendor's right, title and interest, in and to the business of "Green Mill Cafe" located at 1111 Bethel Street, Honolulu, City and County and Territory aforesaid, together with all the furniture, fixture, equipment and good will of said business.

To Have and to Hold the same unto the Purchasers, their administrators and assigns forever.

And the Vendor does hereby for herself, her administrators and executors, covenant and agree to and with the said Purchasers, their administrators and assigns, that she has good title to said property; that they are free and clear from all encumbrances and that she will Warrant and Defend the above-described property hereby sold unto the Purchasers, their administrators and assigns, against all and every person whomsoever lawfully claiming title thereto.

In Witness Whereof, the Vendor hereto has hereunto set her hand the day and year first above written.

/s/ ELSIE YOUNG LUM.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 20th day of October, A.D. 1941, before me personally appeared Elsie Young Lum, to me known to be the persons described in and who exe-

(Testimony of Chong Hing Tenn.)

cutted the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

[Seal] /s/ ELEANOR YOUNG LUM,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission expires June 30, 1945.

Filed June 21, 1948, Circuit Court T. H.

Filed Oct. 12, 1948, Supreme Court T. H.

Q. You are sure about this? How do you know that the bill of sale that was filed with the Liquor Commission was dated October 10?

A. The bill of sale?

Q. Yes, the same thing that was dated October 10, 1941.

Mr. Waddoups: I haven't seen this before.

Mr. Lee: Neither have I. It was received in evidence, Mr. Waddoups.

Mr. Waddoups: Yes.

Mr. Lee: Will you read the last question.

(Question read by the reporter.)

Mr. Lee: Please answer the question.

A. Read it again. (Question read by the reporter).

The Court: In other words, this bill of sale we had here a minute ago is dated October 20. Mr. Herbert Lee, by his question, indicated that the same bill of sale was filed with the Liquor Commis-

(Testimony of Chong Hing Tenn.)

sion is dated October 10, now do you know anything about the other bill of sale?

A. It is also—she has to file it with the Commission to get the license transferred to us.

Q. Who handled the financial end of it? From your side? A. Naturally——

Q. You handled it?

A. I handled my own money. Nobody handle my money.

Q. Who turned over the money to the Lums?

A. My brother turned it over.

Q. Kui Hing? A. Yes.

Q. You gave him the money? [48] A. Yes.

Q. When did you give Kui Hing your money?

A. I can't remember the date. Around October, when the deal was ready for closing.

Q. How much did you give him?

A. \$10,000.

Q. So it was Kui Hing who handled the purchase? A. For the purchase.

Q. On that Green Mill?

A. Yes. We gave him——

Q. Did you have any conversation with Hiram Fong on the legal papers?

A. The legal papers, they were drawn up—I think so. Maybe he handle that thing. We spoke to him that he handle for our brothers, too, together.

Q. Did you know that there was a difference in the dates between the two bills of sales, one which was dated the 10th, which you filed with the Liquor Commission? A. I don't remember that.

(Testimony of Chong Hing Tenn.)

Q. The other one that you got, dated October 20, did you know that there was a difference in the date? A. No, I don't remember.

Q. You don't remember? A. No.

Q. Who filed the statement of the partnership with the Treasurer's office? A. Mr. Fong.

Q. Who gave Mr. Fong instructions concerning the partnership? [49] Who told him who was supposed to have so much share, and how the partnership was to be shared, you, Kui Hing, or Fook Hing?

A. I don't remember that. Maybe me or my brother.

Q. Anyway, it was one of you who told Mr. Fong what to put in the partnership agreement?

A. Yes.

Q. It was either you or Kui Hing? Fook Hing was over on Maui, isn't that true?

A. I couldn't remember if it was me first or not. Maybe me.

Q. When did you see Mr. Fong about drawing partnership papers, was it before October 1st?

A. No. After.

Q. Was it after October 1?

A. After October, before the deal was closed. October 1 the deal is not closed yet. We couldn't make papers.

Q. When did you make the deposit with Mr. Lum?

A. October. I don't remember the date. First payment, October.

(Testimony of Chong Hing Tenn.)

Q. Well, you made your first payment in October?
A. Yes.

Q. How much was the first payment?

A. \$15,000.

Q. \$15,000?
A. Yes.

Q. Of that \$15,000, \$10,000 was Fook Hing's?

A. Yes. Out of that.

Q. Who was the other?

A. Kui Hing. [50]

Q. You hadn't put anything in yet, as of that time?

A. Of that time, yes. We had until the final instruction, if the deal is O.K., then I would put up the balance.

Q. Did you receive a receipt for that \$15,000?

A. I don't remember that.

Q. Who gave the \$15,000, you, or Fook Hing, or Kui Hing?
A. Kui Hing did.

Q. But you talked with Mr. Fong about the partnership, didn't you?

A. I think so, yes, I talked.

Q. You said it was some time in October; was that about October 1, or wasn't it exactly October 1?

A. October 1? I don't remember what date. Some time around the first of October. The 1st or 2nd.

Q. I will show you a statement of copartnership which was filed in the Territorial Treasurer's office, which certifies that on October 1, 1941, the three of you entered into this partnership for the restaurant and liquor business. Do you recall having seen this

(Testimony of Chong Hing Tenn.)

statement of copartnership signed by the three brothers? A. Yes.

Q. Isn't it a matter of fact that you people entered into this partnership as of October 1?

A. Yes.

Q. You entered into the partnership as of October 1? A. The treasurer's office.

Q. Now, didn't you people have Mr. Fong draw up the partnership papers also on October 1? The same date that you people filed the statement of copartnership down in the Treasurer's [51] office?

A. I don't know about the partnership papers, what time it was drawn should be shown. I don't remember what date.

Mr. Waddoups: May I see that, please?

Q. During the month of September, weren't you people in control of the operation of the Green Mill?

A. September?

Q. Yes. Before you closed the deal?

A. No. We went to look at the place. It is under Mr. Lum's operation in September.

Q. Wasn't it a part of the deal that whatever profits came out of the business—this was after your agreement with Lum for \$25,000—wasn't it part of the agreement that you folks were going to have control of the operation for a couple of weeks, and if you people didn't like it, you would call the deal off, and if you did like it, whatever was made from the operation of the business would be applied to the purchase price?

A. No. No agreement that way. We took Octo-

(Testimony of Chong Hing Tenn.)

ber 1, pending approval of the Liquor Commission, for the transfer of the liquor license. Whether we make money or make no money, we assume the place.

Q. Who got all this money that came into the Green Mill?

Mr. Waddoups: The money that came in when?

Mr. Lee: During the period before you closed this deal?

A. Lum, under a special account, Bank of Hawaii.

Q. Who got the money? [52]

A. The special account under Elsie Lum's name. She was the owner of the place.

Q. Was that money applied?

A. Not applied to the purchase price.

Q. It never was applied to the purchase price?

A. No.

Q. Now, isn't this a fact that you had already instructed your lawyer, prior to October 1, 1941, telling him about the partnership, about that you were supposed to put in \$10,000, Fook Hing, \$10,000, and Kui Hing, \$5,000? A. Yes.

Q. Excluding Ching?

A. No. My brother is taking care of him, not me. I didn't know anything about Ching coming in. He had a deal with Fook Hing Tong. I called his attention several times, "Where is the money?" That's all.

Q. What's that?

A. I called his attention, "Where is the money coming from?" It was supposed to come in.

(Testimony of Chong Hing Tenn.)

Q. As a matter of fact, you had already told Hiram Fong prior to October 1, 1941, to draw up partnership papers between the three brothers, isn't that right, among the three brothers? That's correct?

A. I don't know. I told him on October 1.

Q. It was about October 1, or prior?

A. Some time around October.

Q. Wasn't it October 1?

A. When the deal was through, when we need the partnership [53] papers, I told him there was three.

Q. Now, Chong Hing, you recall for a couple of weeks you and Mr. Ching were running the business at the Green Mill before the final bill of sale was executed?

A. Yes. He was around.

Q. He spent quite a bit of time there, didn't he?

A. During his spare time, he came there.

Q. How much time were you putting in?

A. I put there all my time in.

Q. What time did you put in, from when to when?

A. From the morning and night.

Q. Right through to the night?

A. Yes.

Q. You handled all the cash, didn't you?

A. You mean before the bill, before the closing?

Q. Yes.

A. Before we close the deal or after?

Q. No. Before you closed the deal.

A. When the license was transferred, yes.

Q. Yes.

(Testimony of Chong Hing Tenn.)

A. I handled the cash when we got the bill of sale, and turned control——

The Court: No. He is talking about before, while you were negotiating.

A. In the negotiation, I said all the cash turned over to the owners, still handling it. We couldn't touch it, yet.

Q. All right, at the time before, did you spent any time down at the Green Mill? [54]

A. Yes. I was coming to look at the business.

Q. Just to look at it?

A. Well, check up. October 1, we transferred.

Q. Didn't you pay the bills before the final bill of sale was drawn and signed on the Green Mill?

A. Well, I let Elsie pay cash, take out of the cash for the bills.

Q. Didn't you pay it yourself out of the same moneys from the Green Mill?

A. No. I haven't no right to touch it. She is there. The business wasn't closed. She wouldn't turn over that money to me.

Q. Did you people use to order meat during that particular period? When the meat came, you took the cash out of the cash register and paid for the meat?

A. She, the owners did.

Q. I know, but didn't you take money out of the cash register to pay?

A. Sometimes I am there when she is not there, I take and pay bills. The bill is recorded there, paid by me. Is that what you mean?

Q. Yes. A. Yes. I didn't catch on.

(Testimony of Chong Hing Tenn.)

Q. You say Elsie Lum was there?

A. Elsie has been there, the owner of the place.

Q. Besides some of these immediate bills, you paid for cigarettes, and other things, right out of the cash register?

A. I guess so. I don't know. [55]

Q. Anyway, you had control of the money side, so that you could see the amount of business that was coming in, and you paid some of the bills out of the cash register, isn't that right?

A. I guess yes.

Mr. Lee: No further questions.

Mr. Waddoups: No questions.

(Witness excused.)

KUI HING TENN

a respondent herein, called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lee:

Q. Your name is Kui Hing Tenn?

A. Yes.

Q. You are one of the three brothers named as respondents in this case? A. Yes.

Q. Now, Kui Hing, you were present, were you not, during this conversation at your father's home where the three of you were present with Mr. Ching and your father? A. Yes.

Q. At the time was there a discussion on the

(Testimony of Kui Hing Tenn.)

purchase of the Green Mill, the possible purchase?

A. The possible purchase. Yes.

Q. Who had broached the subject of the possible purchase? A. My brother, Chong Hing.

Q. And did you hear Fook Hing Tong, in your presence, ask Mr. Ching whether or not he knew Mr. Lum, the proprietor of the Green [56] Mill?

A. Yes.

Q. Mr. Ching said that he knew him?

A. Yes.

Q. And that he would take you folks over to see Mr. Lum? A. Yes.

Q. Now, at the time, did you people know that the purchase price was approximately \$25,000?

A. At the time?

The Court: Speak out a little louder.

A. At the time it was approximately \$25,000.

Q. That was discussed right at the meeting, wasn't it?

A. I wasn't at the meeting at Mr. Lum's home.

Q. I mean at your home, wasn't that discussed?

A. No. It was not discussed, the \$25,000.

Q. You folks at that time didn't you know what the cost of that place would be? Is that correct?

A. Yes.

Q. You didn't know? A. Yes.

Q. You didn't know? A. I didn't know.

Q. You were not present at the meeting at Mr. Lum's home? A. No.

Q. Now, how did you know that your brothers

(Testimony of Kui Hing Tenn.)

would be interested in buying the Green Mill afterwards; how did you find out?

A. They discussed it with me.

Q. That was the same night or the following night? [57]

A. It could be the same night, or the following night. I don't recall.

Q. Do you recall whether or not it was the same night that Mr. Ching and your brothers went over to see Mr. Lum about the purchase or was it the following day?

A. I believe it was the same night.

Q. You believe it was the same night. Therefore, your brothers discussed with you about the purchase of the business for \$25,000 is that correct?

A. Yes.

Q. Was Mr. Ching also present there?

A. No. I don't think he was present.

Q. Now, what was said at the time when you discussed with your brother—what was the arrangement or the discussion about?

A. Well, the arrangement, we were planning to put up \$25,000. So naturally, we discussed how we were going to raise the money; how much he could put up. He said that he could put up \$10,000.

Q. Who do you mean "he" you mean Fook Hing?

A. Yes. And the other brother, Chong Hing, \$10,000, and I said I can put up \$5,000.

Q. Did you know that Mr. Ching was supposed to put up \$3,000?

(Testimony of Kui Hing Tenn.)

A. Maybe he had a conversation with my brother. I haven't discussed it for the \$3,000. It was between him and Mr. Ching.

Q. You heard that discussion?

A. He mentioned about Mr. Ching.

Q. Your brother, Fook Hing, mentioned it to you? A. Yes.

Q. Your brother Fook Hing left for Maui a day or so later, is that right? [58]

A. He left for Maui, I don't know——

Q. Very soon? A. I don't know how soon.

Q. Did he leave \$10,000 with you? A. Yes.

Q. In the form of a certified check?

A. I don't know.

Q. It was a check?

A. It was a check, I think.

Q. \$10,000 in cash, is that right? A. Yes.

Q. What did you do with the cash?

A. I put it in the bank, checking account.

Q. In your personal account? A. Yes.

Q. Did you have a conversation with Hiram Fong, the attorney, after that? A. No.

Q. You have had no conversation with Hiram Fong? A. No. I left it to my brother.

Q. You left it to your brother, Chong Hing?

A. Yes.

Q. As a matter of fact, all the legal end of the financial deal was handled by Chong Hing?

A. No. When they have the papers all fixed up, I was supposed to handle the cash.

(Testimony of Kui Hing Tenn.)

Q. That's right. I mean contacting Hiram Fong and contacting Lum.

A. They both did; the two brothers did. [59]

Q. The two brothers did. That was during the time that Fook Hing Tong was here? A. Yes.

Q. When Fook Hing left for Maui, who handled the business?

A. The other brothers, Chong Hing.

Q. Who hired Hiram Fong to draw the partnership papers?

A. The partnership papers? I don't know who hired him.

Q. As a matter of fact, wasn't it Chong Hing who hired him? A. It must be.

Q. You never heard? A. No.

Q. When did you put in that \$10,000; when did you come across with the \$10,000?

A. Well, I would have to check up with the bank to see when I put it in.

Q. Was it about October 1?

A. No. It was before.

Q. Before October 1?

A. It was September.

Q. It was September, wasn't it? A. Yes.

Q. Was it around the middle part of September?

A. Probably we had the cash. We just had the money, but never turned that money over yet.

Q. When you turned the money over, who did you turn the money over to? A. Hiram Fong.

Q. To Hiram Fong in person?

A. Yes. [60]

(Testimony of Kui Hing Tenn.)

Q. How much did you give Hiram Fong?

A. I gave him a certified check for \$15,000.

Q. \$15,000? A. Yes.

Q. Who put up the other \$5,000?

A. My brother, Fook Hing, put up \$10,000. I put up \$5,000.

Q. Where did you deliver that check?

A. Hiram Fong.

Q. You went there in person and delivered that check? A. Yes.

Q. Was Chong Hing with you?

A. Well, he left.

Q. He was there before you came and then left, is that correct?

A. Hiram Fong called me up to come down to the office.

Q. With the money? A. Yes.

Q. Did Hiram Fong tell you to bring \$15,000, the matter of \$15,000 was agreed upon?

A. Well, I think my brother had another \$10,000 that he got.

Q. That he got? A. Yes.

Q. That he had already given to Hiram Fong?

A. I don't know whether he gave it to Hiram Fong or not. I brought \$15,000 down.

Q. Did you get a receipt for that?

A. I don't remember that. I gave a check.

Q. You gave a check? A. Yes. [61]

Q. So he didn't give you a receipt?

A. I don't recall whether he gave me a receipt. I think he most probably did.

(Testimony of Kui Hing Tenn.)

Q. Did you get any papers from him when you gave him the \$15,000—Hiram Fong we are talking about? A. I don't know.

Q. Did you just give him \$15,000?

A. I signed some papers there. Maybe he had it fixed or something.

Q. You signed some papers there?

A. Yes.

Q. You don't know what you signed?

A. (Answer inaudible.)

Q. Did you receive papers from him, legal papers? A. I don't know. I don't recall.

Q. Do you know when you signed the articles of partnership? I will show you an exhibit, look at the third page; look it over. Do you remember when you signed it? A. Yes. I do.

Q. When, as of that same date?

A. Same day I signed.

Q. Sure. Or is it because you saw it in the document?

A. I signed this signature there. It must be the same date.

Q. So you gathered that from this document, is that it? A. Yes.

Q. Outside of giving this \$15,000 to Hiram Fong and the conversation about bringing this \$15,000 down, did you have anything to do yourself with the handling of the business end of this deal? [62]

A. No.

Q. Who handled it in toto, this whole thing, who was finally in charge of this deal?

(Testimony of Kui Hing Tenn.)

A. Chong Hing Tenn.

Q. As a matter of fact, you don't know whether or not Chong Hing—you don't know whether the other \$10,000 was paid on this deal to Mr. Lum at the time that you brought that \$15,000 to Mr. Fong?

A. I don't recall.

Mr. Lee: No further questions.

Mr. Waddoups: Just one question.

Cross-Examination

By Mr. Waddoups:

Q. Did you ever make any deal with Ching?

A. No.

Q. Relating to his partnership? A. No.

Mr. Waddoups: That's all.

(Witness excused.)

Mr. Lee: It is 10 minutes to 12.

The Court: Do you have any short witnesses?

Mr. Lee: We had a short witness, but we don't think we would get through.

The Court: All right. We will adjourn now.

(Adjournment.) [63]

Tuesday, June 22, 1948, 9:00 o'Clock A. M. Session

Mr. Lee: We are ready to proceed.

Mr. Waddoups: Ready for the respondent.

Mr. Lee: If your Honor please, I have a few more questions that I would like to ask of the respondent, but before I do that, may I call on two

short witnesses first so that I may dispose of them, so that they may pursue their regular duties?

The Court: Proceed.

MARK Y. MURAKAMI

called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lee:

Q. State your full name, please?

A. Mark Y. Murakami.

Q. Do you know the petitioner, Hung Chin Ching? A. I do.

Q. You were born and raised here, were you not? A. Yes, that's right.

Q. Did you graduate from McKinley High School?

A. McKinley and the University of Hawaii.

Q. Were you a professional boxer at one time?

A. At one time, yes.

Q. Now, in 1941, did you own a tavern called the Pearl Inn? A. I did.

Q. Where is that located? [64]

A. That is at King Street; North King Street. I forget the exact number, but it near the Dillingham Boulevard.

Q. Are you still the owner of that tavern?

A. No. Not any more.

Q. Back in 1941, about August or September, 1941, did this man Ching come to see you?

(Testimony of Mark Y. Murakami.)

A. That's right. It was in the month of August, I guess.

Q. What did he see you about?

Mr. Waddoups: I object to that, your Honor, as incompetent, irrelevant and immaterial. What the Pearl Inn has to do with the Green Mill, I don't know. What Mr. Ching said to this witness is certainly not binding on the respondent.

Mr. Lee: I think it is, your Honor. It is still early yet for the objection. We propose to show that Mr. Ching wanted to buy Pearl Inn.

The Court: Mr. Ching?

Mr. Lee: Yes.

The Court: What has that to do with this?

Mr. Lee: The petitioner desired to purchase the Pearl Inn, that is, by himself. And, if your Honor please, it will bring the situation right up to the moment of the joint venture, just immediately subsequent to this action by Ching. It seems to me, your Honor, that it is very important to show in the record that Ching had the wherewithal to contribute \$3,000 into this venture. It is a circumstance, your Honor, which is by itself of not too much import, but considering the entire pattern, the entire cloth of this joint venture, it becomes an important consideration in showing the development under which the venture into the Green Mill came about. [65]

The Court: What connection did these respondents have with the purchase or the negotiations to purchase the Pearl Inn?

Mr. Lee: Well, the respondents didn't have any

(Testimony of Mark Y. Murakami.)

connection with the Pearl Inn, but the petitioner has a connection. One of the issues in the case has been raised by the answer that there is no tender made by the petitioner, that there was a lack of quid pro quo for the venture to proceed. This circumstance here, your Honor, would be material.

The Court: Supposing your petition went to this man and agreed to pay him a certain amount of money, and put up a certain amount of money in that particular Inn. What has that got to do with this situation? If the question comes up as to whether or not he had his own money to do that, he could testify to it himself.

Mr. Waddoups: That's correct, your Honor.

The Court: To have somebody else testify, it seems to me, is a self-serving declaration.

Mr. Lee: Well, if your Honor please, the element of the petitioner's desire to get into the liquor business wasn't a casual one. His mind was made up to get into the liquor business; to retire from the police department to get into the liquor business, and he went into this thing at first by negotiating for a liquor business of his own, and then the picture comes in where the Tenn brothers were, and they joined forces for a bigger deal, where more money was involved. It seems to me, your Honor, it would be very material. There would be no harm done to the respondent's case here. [66]

The Court: Here is the situation: If he wanted to go into the liquor business, he can testify to it that was his intention to go into the liquor business.

(Testimony of Mark Y. Murakami.)

Then, if there was some opposition put up as to what his intent was, they would ask him what place he intended to buy, then this would be material.

Mr. Waddoups: It might be material, or it might become a material issue at the time. But at this stage of the proceeding it has no place in it. He can testify as to his financial condition at the time of his intention. Now, I might have wanted to buy the corner of Fort and King during the war, but the fact that I wanted to and did not is certainly not evidence that I had the money to do it.

Mr. Lee: If your Honor please, I believe that there will be one of the issues of the case that would come up on this man's intent. We are, in a way, possibly, looking for testimony that would not be made an issue.

The Court: It might become relevant on rebuttal. It certainly would not be relevant with the present status of the case.

Mr. Lee: I think it is relevant by the pleadings as came out by the pleadings in the case, and I ask the court to——

The Court: But, Mr. Lee, here is the situation: You are talking about a tender or the lack of making a tender.

Mr. Lee: Good faith, I might say.

The Court: Good faith, in this particular copartnership. What he did with another copartnership or another deal, what bearing does that have on the present one? [67]

Mr. Lee: Well, I think it has a material bearing to show the petitioner's good faith.

(Testimony of Mark Y. Murakami.)

The Court: Because he was showing good faith in one deal, does that mean, ipso facto, he was showing good faith in another?

Mr. Lee: No. But it is a circumstance which I say is part of the entire pattern of the entire cloth, because we have got to go back of the written partnership.

The Court: Well, it appears on the record at this time, I will say, as to the offer of proof, that these particular Tenn brothers are not involved in this transaction, so that this court feels that it is something that is not germane to the issues here. Objection sustained.

Mr. Lee: I will ask the court to reconsider sustaining the objection, and to allow this to come in, subject to a motion to strike.

The Court: The court has ruled. Proceed.

Mr. Lee: No further questions at this time, your Honor. You are excused, thank you.

(Witness excused.)

K. C. WONG

called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lee:

Q. What is your name, please?

A. K. C. Wong.

Q. What is your business, Mr. Wong? [68]

A. Restaurant and bar.

(Testimony of K. C. Wong.)

Q. Are you the proprietor of a restaurant and bar known as the Riverside Grill? A. Yes.

Q. Where is that located? A. Maunakea.

Q. How long have you been the owner of that business? A. 14 years.

Q. That would make it back in 1934?

A. 1934 or 1935.

The Court: That must have been at the exit of national prohibition?

Mr. Waddoups: He was one of the first under the wire.

Q. Mr. Wong, you have always been more or less interested since 1934 and 1935 in the liquor business, since you owned the Riverside Grill? A. Yes.

Q. Do you know the petitioner, Hung Chin Ching? A. Yes.

Q. Do you know one of the respondents by the name of Fook Hing or Fook Bear Tong?

A. Yes.

Q. Can you point him out in court?

A. (Indicating): The first one there.

The Court: Indicating Dr. Tong.

Q. Do you recall, Mr. Wong, some time during the month of September, 1941, a visit paid to you by Hung Chin Ching and Doctor Tong? [69]

A. Yes.

Q. Will you try to recall what they came to see you about and tell the Court?

A. Yes. They came to see me about the business. I said it is a good buy.

Mr. Waddoups: Just a minute. I am going to object to this, your Honor, until it is tied up to the

(Testimony of K. C. Wong.)

present matter in issue. There is no mention in the pleadings of the Riverside Grill, or any meeting with this gentleman. If this is a question having to do with something that is not in issue in this case, I will have to renew my objection.

The Court: Objection overruled. This is in September, about the time that these negotiations were made to buy a restaurant and liquor establishment. It is tied up with one of the parties. It will be admitted at this time subject to a motion to strike.

Q. Now, what did they come to see you about?

A. Saw me about buying the Green Mill.

Q. Who did? A. The boys.

Q. Who did the talking at that time?

A. Mr. Ching and Mr. Tong.

Q. Who asked you about the Green Mill?

A. Mr. Ching—both.

Q. What did he ask you and what did you say to him?

A. He asked me if he should go into that business.

Q. What business?

A. The Green Mill, or some bar business. [70]

Q. Did you happen to know at the time the proprietor of the Green Mill?

A. Yes. I knew him.

Q. What was his name?

A. Long John, they called him.

Q. Is that Lum Kam Hoo, the proprietor of the outfit called LeRoy's? A. Yes.

Q. Did you tell them about the fact that the Green Mill was for sale or did they ask whether or

(Testimony of K. C. Wong.)

not specifically the purchase of the Green Mill was a good thing or not?

A. I heard about when they sell.

Q. You heard about what?

A. I heard about they are going to sell.

Q. Who was going to sell? A. Long John.

Q. Where did you hear that from?

A. Oh, the boys come along to my place, and they talk about going to sell.

Q. Did you tell them that the Green Mill was for sale? A. Yes.

Mr. Waddoups: By "them" you mean who?

Q. Who did you tell that the Green Mill was for sale?

A. Mr. Ching. I think Mr. Ching or Tong, they came in and asked me if it was a good buy for that business. I said it is good. That's all.

Q. You first told Mr. Ching that the Green Mill was for sale? A. Yes.

Q. Then later on, another conversation, that was when Dr. [71] Tong came in with Ching?

A. Yes.

Q. You told them that it was a good business to go into? A. Yes.

Q. Is that correct? A. Yes.

Q. Do you know whether or not at the time when Dr. Tong was present with Mr. Ching, whether or not they had bought the Green Mill, or whether they were just contemplating buying the Green Mill?

A. Oh, he was in there at the time. We know he buy the place already, all the town talk about it.

Q. In other words, Mr. Wong, at this confer-

(Testimony of K. C. Wong.)

ence——

Mr. Waddoups: Let's clear this up. I am frank to say, your Honor, it is pretty vague to me.

The Court: You can do it on cross. You will have an opportunity.

Mr. Lee: I am trying to clear it up. So let me do it.

Mr. Waddoups: I'm sorry. I didn't mean to interrupt.

Q. Mr. Wong, you first stated that the—let's see if I get it straight—you told Mr. Ching that you had heard that the Green Mill was for sale?

A. Yes.

Q. Was that some time in the early part of September, 1941? A. About that.

Q. About that time? A. Yes. [72]

Q. Was it a few days later or the next day that Dr. Tong and Mr. Ching came there to see you?

A. Yes.

Q. At the time when Dr. Tong and Mr. Ching came to see you, did they ask you whether buying the Green Mill was a good thing or not? A. Yes.

Q. I asked you then whether or not they had bought the Green Mill when they talked with you, or were they thinking about buying the Green Mill?

A. They thinking about buying it.

Q. They hadn't bought the Green Mill yet?

A. Not yet.

Q. You are sure about that part of it?

A. Yes.

Q. That was when you had this long conversation

(Testimony of K. C. Wong.)

whether it was a good business, is that correct?

A. Yes.

Mr. Lee: Your witness.

Cross-Examination

By Mr. Waddoups:

Q. How long have you known Dr. Tong?

A. I know him since—not very long. It is about between 1941 or 1940.

Q. How long have you known Ching?

A. I know Ching since I was young.

Q. You were all friends, is that correct?

A. Yes.

Q. Did they tell you what the price was? [73]

A. What?

Q. Did they tell you what the price was of the Green Mill? A. The price? No.

Q. How could you tell it was a good buy?

A. I told him it was a good business to go in.

Q. You just told him that the bar business was a good business to go in at the time? A. Yes.

Q. But you didn't tell them that the purchase of the Green Mill was a good buy?

A. I told him a good buy, too.

Q. Did you tell him it was a good buy without knowing what the purchase price was?

A. No. I did not.

Q. You didn't know how much that they would have to pay for it? A. No.

Q. When you told them that it was a good buy, you meant by that they had a good business at the Green Mill? A. Yes.

(Testimony of K. C. Wong.)

Q. That the liquor business, generally, at the time was a pretty good business to get in, is that correct? A. Yes.

Q. You didn't mean, in saying that that you did, that the price that they were paying for it was right? A. No.

Q. You didn't mean that, because you didn't know the price, is that correct? A. Yes. [74]

Q. Doctor Tong was buying the business, was he not? I mean Doctor Tong was the one who was buying the business, isn't that correct?

A. I think they were both. I don't know.

Q. You didn't know who was putting up the money, is that right? A. Yes.

Q. You didn't know who was going to buy it, or what proportions they were going to pay for it? You didn't know that? A. No.

Q. You didn't know what amount of money that they were going to pay for it? A. No.

Q. So that all that you were prepared to tell them at the time was that the Green Mill had a good business? A. Yes.

Q. That the liquor business itself was a good business at the time? A. That's right.

Mr. Waddoups: No further questions.

Redirect Examination

By Mr. Lee:

Q. Well, now, didn't you know about Mr. Ching wanting to put some money into this Green Mill?

(Testimony of K. C. Wong.)

A. Well——

Mr. Waddoups: I object to that as leading, calling for something that is not in the evidence?

The Court: Sustained. The answer is stricken.

Q. Well, was there anything said about how much money Ching was putting in, or Ching was to put in?

Mr. Waddoups: I object to that for the same reason.

A. I don't know——

The Court: Just a minute.

Mr. Waddoups: He has already testified that he knew nothing about it.

The Court: Well, he didn't testify to that. The only thing that he said that he didn't know the price, and didn't know who was buying, or the price or by whom the price was to be paid.

Mr. Waddoups: That's correct.

The Court: There was nothing definite, as I recall.

Mr. Waddoups: Your Honor is correct, I think, on that.

The Court: Objection overruled.

Q. Do you remember the question?

Mr. Lee: Read it back.

The Court: Did either one of them say anything to you about how much he was going to invest?

A. That I forget.

Q. To refresh your recollection; at the time didn't Mr. Ching say that he was going to put in \$3,000?

(Testimony of K. C. Wong.)

Mr. Waddoups: I object to that, your Honor, as leading.

Mr. Lee: I am trying—I have exhausted the man's——

The Court: The man says that he has forgotten. I take it that you can ask a leading question, when he says that he has forgotten. If he said that he didn't know, that is a different thing, but he has exhausted his recollection. [76]

Q. (By Mr. Lee): Do you recall saying that? You said to him, "Why didn't you put in \$5,000?"

A. I asked Mr. Ching, and he said about \$3,000. "Why didn't you put in \$5,000?"

Q. Who said that?

A. I said that. He said that he hasn't got enough money. So he asked me for a loan. I said, "I can help you."

Q. Mr. Ching asked you to help him a little bit?

A. Yes.

Q. Were you ready to help him? A. Yes.

Q. Did you tell him that? A. Yes.

Mr. Lee: No further questions.

Recross-Examination

By Mr. Waddoups:

Q. Did you ever help him? Did you give Ching any money? A. No. I didn't give him.

Q. Did he ever come to you and ask you for any money? A. He came and asked me.

Q. Why didn't you give it to him at the time?

(Testimony of K. C. Wong.)

A. Well, at the time I didn't know if he got any or not.

Q. How much were you prepared to give him?

A. Oh, about a little over \$1,000.

Q. What do you mean?

A. About \$2,000 I promise him, if he mortgage his house he can get \$3,000.

Q. When was this, Mr. Wong, was this before you had the conference with Ching and Tong? [77]

A. Yes. Before that he buy the place.

Q. Did you see Ching before he and Doctor Tong came up to your place of business to discuss this question of whether this was a good buy?

A. Yes.

Q. Was it on that occasion that you told him that you could give him about \$2,000?

A. Yes.

Q. Did he ever come back after that to get the \$2,000?

A. He came back and asked me if I am ready. I said, "Any time you are ready, come and get it."

Q. When was it that he told you to get ready?

A. I don't remember the dates.

Q. Was it after you talked to Doctor Tong and Mr. Ching or before? A. How's that?

Q. Doctor Tong and Mr. Ching came up to your place of business and you had a conference?

A. Yes.

Q. If I understand your testimony correctly, before that time—before they came up to discuss the

(Testimony of K. C. Wong.)

liquor business with you, Mr. Ching had come up to you and you had promised to give him \$2,000?

A. Yes.

Q. Or about \$2,000? A. About \$2,000.

Q. If he would mortgage his house for you?

A. No. No. Not to me.

Q. Well, who was he going to mortgage it [78] to?

A. I don't know where he was going to mortgage it.

Q. Were you going to loan him the money on the basis of a mortgage or something else?

A. No. Just loaning him the money.

Q. Without security? A. Yes.

Q. Ching was a police officer at the time, was he not? A. Yes.

Q. Was he on your beat?

A. No. Sometimes.

Q. Sometimes he was on your beat?

A. Yes.

Q. When did he come back after the first time that you promised? When did he come back to ask you again for the money?

A. A few days. Every few days. Week to week; maybe weeks and weeks. I don't remember what time he came.

Q. He came in every other week for weeks and weeks, is that correct? A. Yes.

Q. Did that continue into November?

A. I don't remember.

(Testimony of K. C. Wong.)

Q. Did he ever come to see you about this \$2,000 after the blitz?

A. He came to see me, but never let me know. I said, "Any time that you want to get ready, I get ready for you."

Q. I take it from that, you are still ready to give him \$2,000 if he wants it, is that correct? [79]

A. Yes.

Q. He never did come back and say, "I am ready. I want it now," is that right? A. Yes.

Q. So that you actually never gave him five cents?

A. I never gave him. I loaned him a check when he went up to Maui, \$75 to try to see Tong.

Q. Did he borrow money from you to go up there on that? A. Yes.

Q. I see. He told you that was why he was going? Did he tell you he was broke at the time?

A. No. He didn't say broke.

Q. He just said that he needed \$75, is that correct? A. Yes.

Q. Do you know who owned the Green Mill?

A. Yes, Mr. Lum.

Q. Do you know who owns the Green Mill now?

A. Now, I don't know. Mr. Tong. It is between them. It used to be with Ching.

Q. Did you see Ching operate that place?

A. Well, I saw him there when they started.

Q. Did you talk to Ching about it later?

A. No.

Q. You haven't talked to Ching about that busi-

(Testimony of K. C. Wong.)

ness since then? A. No. I don't bother him.

Q. Have you talked to Ching about that business since October, 1941? A. No. [80]

Q. When——

A. 1941. I don't know what dates.

Q. I say: Have you talked to Mr. Ching about this business? A. Yes, I talked to him.

Q. Since October, 1941? A. Yes.

Q. When was the last time that you discussed it with him?

A. When was the last time? You mean 1941?

Q. No. The last time since 1941, any time?

A. Sometimes I just go to the house for a visit. I didn't talk to him much about it.

Q. You are familiar with the rule that police officers cannot buy an interest in the liquor business?

Mr. Lee: I object to that as incompetent, irrelevant and immaterial, whether he knows of this rule.

Mr. Waddoups: He knew he was a cop, if your Honor please.

The Court: Overruled, on the ground that it may go to the credibility of the witness.

Q. Are you familiar with that rule?

A. Yes.

Q. In the Police Department?

A. He tried to quit the job.

Q. He tried to quit the Police Department?

A. Yes.

Q. How do you know that?

(Testimony of K. C. Wong.)

A. He told me. I told him, "You have to quit the job; put more time in to work." [81]

Q. Wouldn't they let him quit?

A. He didn't say.

Q. He didn't quit, did he? He is still a police officer, isn't he? A. Yes.

Q. So, so far as you are concerned, you know that he has not to date acquired any interest in the liquor business, is that your understanding?

A. As I understand.

Q. You said a while back that you saw him running this place here? A. Which place?

Q. The Green Mill.

A. He said that he had to see there.

Q. You saw him up there?

A. There has been times we go in there. We go in there, drop in for a drink.

Q. Just went in there to have a drink?

A. Yes.

Q. So that when you left the impression he was running it you don't want the court to get that, do you, is that correct? A. No.

Q. Is that right?

A. What's that? I don't understand what that is.

Q. Let me put it this way. Maybe I am wrong. You have given me the impression from your testimony that you earlier stated that you saw Mr. Ching running the Green Mill when they first opened, is that correct? [82] A. Yes.

Q. Was he a police officer at the time?

(Testimony of K. C. Wong.)

A. No. He was a police officer, but he is off then.

Q. But he was none the less on the force, was he not? A. Yes.

Q. The fact is, Mr. Wong, you don't know who acquired this business, isn't that right?

A. No. I don't.

Q. Any idea that you have had about what Mr. Ching's interest in the business was coming from Mr. Ching, is that correct? A. Yes.

Q. He is the one who told you anything pertaining to his connection with the Green Mill? Is that right? A. Yes.

Mr. Waddoups: That's all.

Redirect Examination

By Mr. Lee:

Q. Mr. Wong, let's get this clear——

Mr. Waddoups: If your Honor please, just a minute. At this time, if your Honor please, I move to strike all the testimony given by this witness as to Mr. Ching's interest in the Green Mill, on the ground that it was—the source of it was purely self-serving, a self-serving declaration. It is on his own statement just made.

Mr. Lee: If your Honor please, the testimony is shown to have been borne out, and was raised by counsel for the respondents themselves, and that whenever it was developed on cross-examination, it occurred at the time [83] of the conference with both, prior to and during the——

(Testimony of K. C. Wong.)

The Court: The motion to strike will be denied. There is no jury here. We consider the source.

Mr. Waddoups: All right.

Q. (By Mr. Lee): Now, Mr. Wong, as I understand it, you wanted Ching to put up, or go into the business, and put in \$5,000? A. Yes.

Q. And he told you that he didn't have enough money and could only put in \$3,000, is that correct?

A. Yes.

Q. And that you were willing to lend him \$2,000?

A. Yes.

Q. You also stated that Ching was going to mortgage his property. Was that to raise the other \$3,000?

A. No. I don't know. Mortgage about \$1,000, I think.

Q. Mortgage \$1,000, and then he gets \$3,000, is that right? A. Yes.

Q. You went over to the Green Mill when they opened? A. Yes.

Q. Now, when you went over there, was it opening day or what? A. Opening day.

Q. Opening day. Who was present, running the place? A. I don't know who was running it.

Q. I mean was Mr. Ching there?

A. He was there, shaking hands with the [84] people.

Q. Did you shake hands with him?

A. Yes.

Q. You said that he offered you a drink?

(Testimony of K. C. Wong.)

A. Yes.

Q. At the place? A. Yes.

Q. Did you have a drink?

A. I had a drink.

Q. Did you have to pay for that drink?

A. I bought a drink, too. But I bought my drink first, and when I drink it—just to give him some business.

Q. It was an honorary custom among you bartenders, you tavern keepers that you didn't want to pay for the first—I mean you didn't want to get a free drink the first time? A. Yes.

Q. You want to pay for that? A. Yes.

Q. Were there other people there, Doctor Tong, Chong Hing Tenn?

A. I don't remember very much. It is kind of cloudy.

Q. Were there a lot of flowers sent there?

A. Oh, yes, flowers.

Q. Did you send any flowers?

A. No. I didn't send any flowers. I was busy myself.

Q. Did you notice who was shaking hands with whom?

A. I was shaking hands with Ching.

Q. Were there any other people shaking hands with Ching?

A. I forget the other ones. [85]

Q. What was Ching doing?

A. He was running around, like cashier, some-

(Testimony of K. C. Wong.)

times. Not stay too long. A little while he stay there.

Q. How long did you stay there?

A. About ten or fifteen minutes.

Q. During that ten or fifteen minutes did you see Ching? Was he very busy? A. Yes.

Q. He was shaking hands with all the people and at the cash register? A. Yes.

Q. Did he tell the waitresses, and so on, what to do? A. Yes.

Mr. Lee: No further questions.

Recross-Examination

By Mr. Waddoups:

Q. As a matter of fact, one time you told Doctor Tong in your opinion Ching was not reliable, isn't that right?

Mr. Lee: I object to that as incompetent, irrelevant and immaterial. What is the difference, whether or not he told Doctor Tong Ching was reliable or not?

The Court: Objection sustained. Not on anything that was brought out on redirect examination.

Mr. Waddoups: Very well, your Honor. That's all.

(Witness excused.) [86]

HENRY N. THOMPSON

called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lee:

Q. State your name, please.

A. Henry N. Thompson. Secretary of the Liquor Commission, City and County of Honolulu.

Q. How long have you been with the liquor commission? A. About 13 years.

Q. How long have you been secretary?

A. The last two years.

Q. Back in 1941, were you employed by the liquor commission? A. I was.

Q. In what capacity?

A. Assistant chief inspector.

Q. You have with you the records of the Green Mill? A. That's right.

Q. What is the Green Mill?

A. The Green Mill cafe, on Bethel street, dispenser general premises.

Q. It is on Bethel street, is that right?

A. Yes.

Q. Is that just above the Hotel Bethel?

A. Just above, it is 1111.

Q. Do you have with you there the official records containing an application for the transfer of the liquor license by one Elsie Lum to Fook Hing Tong, Kui Hing Tenn and Chong Hing Tenn? [87]

A. Yes.

(Testimony of Henry N. Thompson.)

Q. What was the first thing that came to the attention of the liquor commission considering the premises in relation to the transfer of this liquor license to these people from Mr. Lum?

A. The request by Mrs. Lum to transfer the license to Mr. Chong Hing Tenn. There is a letter in here dated the 6th of October, 1941.

Q. Let me see this. This was on the stationery of Hiram L. Fong, attorney at law, isn't that right?

A. Yes.

Q. Dated October 6, 1941. It states——

Mr. Waddoups: Were you going to introduce it?

Mr. Lee: Yes. I am going to have it identified and have copies of this. I notice here in this letter it says to transfer dispenser general liquor license to Chong Hing Tenn, as we are about to consummate the sale of my business, the Green Mill Cafe, located at 1111 Bethel street. Attached hereto is a copy of the bill of sale, which I intend to give to Mr. Chong Hing Tenn upon receiving authorization from your commission.

Do you have a copy of that bill of sale that was used? This was a copy of the bill of sale that accompanied the letter? A. Yes.

Q. Now, you notice that the bill of sale was dated October 10, 1941?

A. No. This bill of sale was given to us after the sale [88] was approved by the commission. Then we requested a bill of sale for our office files.

Q. In other words, in this letter there was no bill of sale attached?

(Testimony of Henry N. Thompson.)

A. He may have sent them an unsigned bill of sale, I don't know, but the one that we kept the record of is after the sale was completed.

Q. Wouldn't you make a notation if there was no bill of sale?

A. You mean the secretary at the time. I didn't receive this correspondence.

Q. I note here that only Mr. Chong Hing Tenn's name was typewritten. A. Yes.

Q. In handwriting there were two other names then put in, Doctor Fook Hing Tong, and Kui Hing Tenn. Who were they written by?

A. It is Ray Irwin, who was secretary at the time.

Q. In other words, it was written by an employee of the liquor commission? A. Yes.

Q. Not by Mrs. Lum herself?

A. No. Well, the report from the chief inspector and myself, I think, mentions——

Q. You made the report on this?

A. I made the report on this.

Q. Dated October 9? A. Yes.

Q. 1941? A. Yes. [89]

It is mentioned here that they advanced the money, \$25,000 purchase price.

Q. When was the investigation made? There was a report made, dated October 9?

A. It was a few days before.

Q. It would be a few days before that?

A. Yes.

(Testimony of Henry N. Thompson.)

Q. Who made this investigation, Malani and yourself? A. Yes.

Q. Generally, how much ahead of time do you take and investigate these?

A. Sometimes it takes us a week.

Q. So the investigation might have begun on October 1?

A. No. It could have been right after it was received.

Q. Well, after this letter was received?

A. Yes.

Q. I also note that there is a statement of copartnership filed at your office, is that generally required by the commission? A. Yes.

Q. And this statement of copartnership has the name of Kui Hing Tenn and Chong Hing Tenn and Fook Hing Tong? A. Yes.

Q. And it certifies that the partnership began October 1, 1941? A. Yes.

Q. Do you have any other records of the Green Mill at this time? A. No. [90]

Q. Is there anything else?

A. No. The whole thing is the Green Mill folder.

The Court: When, according to the record there, was the transfer consummated?

Mr. Lee: When was it consummated? October 10.

Mr. Waddoups: I think there is already a document in evidence covering that, that was the original letter.

(Testimony of Henry N. Thompson.)

Mr. Lee: That's true, Mr. Waddoups. It is a letter.

Mr. Waddoups: Being Petitioner's Exhibit B.

The Court: Well, that is dated what?

Mr. Waddoups: The date of the letter is October 11, setting forth what occurred on October 10, 1941, said request was granted.

The Court: All right.

Mr. Lee: With your Honor's permission, may the following documents be identified at this time?

The Court: What he might do is leave this in the file. Don't mess up his file. Then you can make copies of them and Mr. Waddoups can have the right to check.

Mr. Lee: I have had copies made.

The Court: Let Mr. Waddoups take a look at the copies. Take five minutes and check them.

Mr. Waddoups: We will do it during the recess, your Honor.

The Court: Take a recess.

(Recess.)

Q. Mr. Thompson, this is a copy of the statement of copartnership that was filed with the treasurer?

Mr. Waddoups: We have no objection to that copy going [91] in evidence without further identification.

The Court: All right.

Mr. Lee: It will be marked and received in evidence.

(Testimony of Henry N. Thompson.)

The Court: That is the statement of copartnership filed with the liquor commission?

Mr. Waddoups: Yes.

The Court: Let's see, the last exhibit is what? This would be Exhibit D, in evidence.

(The document heretofore referred to was marked Petitioner's Exhibit D, and received in evidence.)

PETITIONER'S EXHIBIT D

Received by Liquor Com. on October 20, 1941.

Filed at Treasurer's Office on October 20, 1941.

Statement of Co-Partnership

Of Green Mill Cafe, County of Honolulu, T. H.,
October 13, 1941 to the Treasurer of the Territory of Hawaii, Honolulu, T. H.

Sir:

This Is To Certify that on the 1st day of October, 1941 the undersigned entered into and formed a general partnership and herewith submit for filing in your office in compliance with law, the following statement:

1. The names and residences of each of the members of said copartnership are:

Fook Hing Tong, address, National Guard
Camp, Wailuku, Maui.

Chong Hing Tenn, address, 1927 Coyne St.,
County of Honolulu

(Testimony of Henry N. Thompson.)

Fook Hing Tong, adress, National Guard Camp,
Wailuku, Maui.

2. The nature of the business of said co-partnership is to maintain and carry on a restaurant and liquor business.

3. The firm name of said co-partnership is Green Mill Cafe.

4. The place of business of said co-partnership is at 1111 Bethel Street in the District of Honolulu and County of Territory of Hawaii.

Witness our hands, this 13th day of October, A.D. 1941.

/s/ CHONG HING TENN,

/s/ KUI HING TENN,

/s/ FOOK HING TONG.

Territory of Hawaii,

City and County of Honolulu—ss.

On this 14th day of October, 1941, before me personally appeared Kui Hing Tenn and Chong Hing Tenn, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

/s/ ELEANOR YOUNG LUM.

Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires June 30, 1945.

(Testimony of Henry N. Thompson.)

Acknowledged by Fook Hing Tong, at Maui, on October 16, 1941.

Notorized by Shizuichi Mizuha, Second Judicial Circuit.

Filed June 22, 1948, Circuit Court, T. H.

Filed Oct. 12, 1948, Supreme Court, T. H.

Q. Now, Mr. Thompson, at the time when the liquor commission was considering this transfer of this license, did you and Mr. Milani, the chief inspector, at the time interview Chong Hing Tenn?

A. That's right.

Q. One of the partners? A. Yes.

Q. Did you make a report of the conversation had with Mr. Tenn?

A. The report was made by Chief Milani.

Q. Concurred in by you, is that right?

A. Yes.

Q. So that you were persent when this interview with Chong Hing Tenn occurred?

A. No, sir.

Q. Now, as a part of this entire report there is —Mr. Milani and your particular inspector's report. I will ask you to look at this same report. That is taken from your report, excluding the top part, which consists of or contains [92] the personal history of Chong Hing Tenn.

A. It is part of our report.

(Testimony of Henry N. Thompson.)

Q. That is part of your report? A. Yes.

Mr. Lee: Is there any objection?

Mr. Waddoups: May I ask a question or two about it?

Mr. Lee: Certainly. Go ahead.

Cross-Examination

By Mr. Waddoups:

Q. At the time of your report, copies of which I have here, which was dated October 10, 1941, you were addressing yourself to the proposition of Mr. Chong Hing Tenn taking the license individually, were you not, and not of the copartnership?

A. That I don't remember, how the copartnership came in, but I think it was done by our secretary. I can't remember back.

Q. But your reports relate only to Chong Hing Tenn? A. That is right.

Q. That's correct. But so far as the present licensee is concerned, or the prospective licensee is concerned, on whom you sent in a report, that was addressed solely to Chong Hing Tenn?

A. Yes.

Q. That did not at the time contemplate a copartnership, is that correct? A. No, sir.

Mr. Waddoups: We will object to it, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial, not binding on the other two respondents. It is addressed solely to the individual. We realize that it is [93] a court of

(Testimony of Henry N. Thompson.)

equity, and the court can sift the equity properly, but we do not want the record to appear that we are waiving any rights we have in that connection.

The Court: I can't very well rule on it unless I know what it is all about. The report will be received in evidence, over counsel's objection, and marked Exhibit E. It is understood that this is a copy from the reports of the liquor commission. I understand that there is no objection on the ground that it is just a copy from their records.

Mr. Waddoups: No. There is no objection on that ground.

The Court: Very well.

(The document heretofore referred to was marked Petitioner's Exhibit E, and received in evidence.)

PETITIONER'S EXHIBIT E

Rec'd by Liquor Commission on October 10, 1941.

Inspector's Report

By a mutual verbal understanding with a very intimate friend, Mr. Chong Hing Tenn was in partnership with one named James Omura, doing business as the Hai Liquor House, exercising a retail beer and wine, and a dispenser beer and wine licenses, from 1937 to 1939, when the business was sold to John Rochas, in May 1939, for \$650.00 This business was a separate unit from that of the Tong Fat Tenn Store. Since leaving the plantation in

(Testimony of Henry N. Thompson.)

1940 he has been in his father's store, which he has operated as his own.

Purchase price is \$25,000.00 cash. The applicant has \$10,000.00 of his own. His brother, Doctor Fook Hing Tong is advancing \$10,000.00 and another brother, Doctor Kui Hing Tong, \$5,000.00, and are his backers, starting him in business. This is a family business affair, and eventually may combine all brothers later.

There is about 4 years left to the present lease which expires in 1945. Rental now is \$350.00, of which the Metronome Music Store pays \$130.00, being that they have acquired a portion of the original premises.

This is a bona fide restaurant, that is well patronized during meal hours, and we believe that Mr. Chong Hing Temm, will be a satisfactory licensee. He is an experienced business man, and is to be assisted by Mr. Ching, at present a Sergeant in the Police Department, who will retire therefrom. Although the present licensee and her husband have been conducting this place in a satisfactory manner, we believe the transfer will be an improvement. We recommend that the request to transfer be granted.

Respectfully submitted,

CLAUDE K. MALANI,

Chief Inspector.

/s/ HENRY N. THOMPSON,

Assistant Chief Inspector.

Filed June 22, 1948, Circuit Court, T. H.

Filed Oct. 12, 1948, Supreme Court, T. H.

(Testimony of Henry N. Thompson.)

Q. (By Mr. Lee): Calling your attention to the last paragraph of this report to the commissioners, you state, "This is a bona fide restaurant that is well patronized during meal hours. We believe that Mr. Chong Hing Tenn will be a satisfactory licensee. He is an experienced business man and is to be assisted by Mr. Ching, at present a sergeant in the Police Department who will retire therefrom." Where did you get this report that Mr. Ching—let me ask you this, I withdraw that question—who was it referred to by Mr. Ching?

A. We get that from Mr. Chong Hing Tenn himself.

Q. What Mr. Ching?

A. Sergeant Ching here.

Q. Is that Sergeant Hung Chin Ching sitting in the chair here? [94]

Q. Mr. Chong Hing Tenn reported to you commissioners, or to you, rather, and Mr. Milani, that Mr. Ching was at present a sergeant in the Police Department but had retired? A. Yes.

Q. Accordingly, you felt that the transfer would be given in this situation at the Green Mill?

A. Yes.

Q. Is that correct? A. Yes.

Mr. Lee: I have no further questions.

(Testimony of Henry N. Thompson.)

Recross-Examination

By Mr. Waddoups:

Q. Did you interview Chong?

A. Mr. Milani did. I was right there.

Q. Milani interviewed Chong. Where was that, right on the premises? A. At our office.

Q. Oh, at your office? A. Yes.

Q. Ching was not named as a prospective licensee, was he?

A. Not at the time, no, sir.

Q. When you said assisted, it was the impression that he would be there more or less as a manager, bouncer, or some such capacity?

A. That's right.

Q. It is a fair statement, isn't it, to say that the liquor commission, in determining whether they would grant a license, or would grant an application for a transfer, is very much concerned about having someone on the premises at all times [95] that can keep order? A. That's right.

Q. Is it also a fair statement to make that the liquor commission, in issuing a license, particularly a dispenser general license, has a policy against hidden partners? Isn't that correct?

A. That's true.

Q. Where there are hidden partners who do not actually appear as the prospective licensees, but later show up to be taking a portion of the licensed premises? That policy is frowned upon by the liquor commission? A. Yes.

(Testimony of Henry N. Thompson.)

Mr. Lee: That is objected to,—just a moment,—I will ask that the answer be stricken, and the previous question, that the answer be stricken on the ground that it is entirely irrelevant, immaterial and incompetent. It does not go to the matter asked on direct examination; your Honor.

Mr. Waddoups: If your Honor please, counsel for the petitioner,——

The Court: Well, it is cross-examination on this Exhibit E. The objection is overruled. The answer to the first question will remain, so also the answer to the second.

Mr. Waddoups: I think that's all.

Redirect Examination

By Mr. Lee:

Q. One more question. As I understand it, Milani, in your presence, interviewed Hung Chin Ching?

A. We had nothing to do with Ching, not at the office there. We had Tenn over there. [96]

Q. Who interviewed Tenn?

A. Not Ching.

Q. You mean Chong Hing Tenn? A. Yes.

Q. All this thing that was brought up by Mr. Waddoups concerned Chong Hing, not Hung Chin Ching?

A. He asked who we questioned, and I said we questioned Tenn. I think there was information that Ching was going to represent him as a sort of manager.

(Testimony of Henry N. Thompson.)

The Court: The information was taken from one of the partners, it is Chong? That was a part of your official copy which you offered in evidence as part of the records of the liquor commission. Of course, it is in evidence. You offered it. It was received.

Mr. Lee: I think it is an entirely different matter.

The Court: Let me see that Exhibit E.

Mr. Lee: Well, I withdraw my objection.

The Court: He is to be assisted by Mr. Ching at present sergeant of police.

Mr. Lee: I withdraw my objection, your Honor. But I want the record clear that it was regarding Chong Hing Tenn and not Ching.

Mr. Waddoups: That's fair enough.

The Court: The redirect examination would straighten that out.

Mr. Lee: No further questions.

(Witness excused.)

The Court: I see Mr. Nelson is here. Do you want to put him on? [97]

AXEL E. NELSON

called as a witness on behalf of the petitioners,
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lee:

Q. State your name? A. Axel E. Nelson.

Q. What is your occupation?

(Testimony of Axel E. Nelson.)

A. Police officer.

Q. How long have you been a police officer?

A. About 13 years.

Q. Now, were you a police officer in 1941?

A. Yes.

Q. Particularly about the month of August, September, and October, 1941? A. Yes.

Q. What was your position with the Honolulu Police Department at the time? What were you, sergeant? A. Sergeant of police.

Q. Do you know the petitioner in this case, Mr. Hung Chin Ching? A. Yes.

Q. Was he a police officer at the time?

A. Yes.

Q. Do you know what his official position was at the time?

A. He was a sergeant of police.

Q. The same rank as you had?

A. That's right.

Q. How much were you making at the time? [98]

A. I don't recall.

Q. What? A. I don't remember.

Q. You don't remember. What are you now, captain? A. Lieutenant.

Q. Now, the Police Department, has it any rules, or had it any rules at the time, in 1941, concerning police officers having an interest in the liquor business? A. Yes.

Q. What was that rule?

A. If you are interested in it financially, either

(Testimony of Axel E. Nelson.)

yourself or your wife in a liquor establishment, then you would have to give up being a policeman or give up the liquor business, one or the other.

Q. Did you have any conversation with Mr. Ching,—Hung Chin Ching, concerning his giving up his position with the Honolulu Police Department to go into the liquor business?

A. I don't recall when it was. I know it was quite some time ago.

Q. Was that in 1941?

A. It may have been. I know it was a long time ago.

Q. Was that before the war?

A. I am not absolutely positive, but it was right around that time, anyway.

Q. About that time before the war, is that correct? A. Yes.

Q. What was said?

Mr. Waddoups: Objected to, your Honor, [99] as incompetent, irrelevant and immaterial, a self-serving declaration.

Mr. Lee: I withdraw it.

Mr. Waddoups: Hearsay.

Mr. Lee: I withdraw it.

Q. Was there a conversation had with Mr. Ching, concerning Mr. Ching's entry into the liquor business? Was there a conversation had between you? A. Yes. There was.

Q. Between you and Mr. Ching, wherein he would quit his job in the Police Department and go into the liquor business?

(Testimony of Axel E. Nelson.)

A. Yes. There was.

Q. That conversation was had before the war?

A. I wouldn't want to say that definitely, but I know it was a number of years ago. It was right around 1941. I don't know for certain.

Mr. Lee: No further questions.

Mr. Waddoups: If your Honor please, I will move to strike the testimony from the record relative to the conversation about the liquor business because it has not been shown to relate to this particular business.

The Court: Objection overruled. The motion will be denied.

Mr. Waddoups: No questions.

Mr. Lee: That's all.

(Witness excused.)

Mr. Lee: Now, if your Honor please, may I recall Chong Hing Tenn in substantiation of my opening statement this morning? [100]

CHONG HING TENN .

a respondent herein, was recalled, and testified further as follows:

Further Direct Examination

By Mr. Lee:

Q. Now, Mr. Tenn, yesterday you stated that Mr. Kui Hing Tenn, your brother, was handling the financial end of this business. Was that true? Is that true?

(Testimony of Chong Hing Tenn.)

A. When we made the first payment on there.

Q. When was that first payment?

A. For the purchase of the business.

Q. That was the only thing that Kui Hing Tenn handled?

A. For the purchase, yes.

Q. And who handled the rest of the financial and legal transaction?

A. I did most of it.

Q. You did that, not Kui Hing?

A. Not Kui Hing. I did most of it.

Q. I say, you did most of it?

A. Yes.

Q. Now, you say that Kui Hing made the first payment?

A. Yes.

Q. Do you know what the first payment was?

A. For the purchase.

Q. How much was it?

A. \$15,000.

Q. No more than that?

A. \$25,000 in all in the whole thing. [101]

Q. Did you pay \$10,000 yourself at the time when Kui Hing Tenn paid the \$10,000?

A. I give that money to him, then he gave it to me to pay it. Something like that. I don't remember how that was.

Q. You just stated now that you were the one who handled the finances.

A. I mean the purchase price.

Q. On the payment of the \$15,000?

A. I say, on the purchase price, he had \$15,000 to pay. He paid \$15,000.

Q. That's right. At the time I am asking did you pay the other \$10,000? Answer that yes or no.

(Testimony of Chong Hing Tenn.)

Mr. Waddoups: I think he is confused.

A. I don't remember if he paid or I did. He gave me back the money to pay to Hiram Fong. I don't remember who paid at that time. The record shows it has been paid. Either he or I. I couldn't remember. It is eight years ago.

Mr. Waddoups: I think he is confused between paying and delivering.

A. Delivery; delivering the check?

The Court: Do you know who took the money down to Hiram Fong's office, the last \$10,000?

A. The last \$10,000. I couldn't be sure if I did it.

Q. How much was the inventory?

A. \$10,000 and something. I don't remember how much.

Q. Well, I will show you a document here, a mortgage and a note on the Green Mill. This might help you in refreshing your recollection. Take a look at this document.

A. Yes. I remember that. [102]

Q. You are familiar with that?

A. I signed this note here.

Q. You signed a note for \$10,000?

A. Yes.

Q. That was for inventory?

A. For inventory.

Q. Was that the price of that; was that amount for inventory or was that for something else? Are you sure that was for inventory?

(Testimony of Chong Hing Tenn.)

A. I think it is for the inventory.

Q. You mean that you don't know whether that was for the inventory or the balance of the purchase price on the business? A. No. It is inventory.

Q. You are sure about that, now?

A. It is the balance,—the purchase price said \$25,000. It could not be \$46 more, not more and not less.

Q. Was the inventory agreed upon as to its amount by the Lums and you?

A. Set by the bookkeeper.

Q. That bookkeeper, was that Kam Tai Ching?

A. Yes.

Q. He was the bookkeeper for Lum, and half owner of the business? A. And also for,—

Q. For you? A. For a while.

Q. For a while. Until the end of the year, 1941?

A. Yes.

Q. After 1941 you had a bookkeeper by the name of Wallace [103] Aoki? A. He died,—

Q. He died?

A. —and naturally, we had to hire another one.

Q. And he knew about the inventory? —Kam Tai Ching?

A. Of course, he made the inventory.

Q. Did you know him well? A. Kam Tai?

Q. Before his death?

A. No, not very well.

Q. But you knew him well enough to want him

(Testimony of Chong Hing Tenn.)

to continue with his bookkeeping? You hired him, is that right?

A. The former owner recommended him he is a good man, a capable man, so we let him carry on until he died.

Q. Was he a good man before his death? Did he keep your books good? A. Very fair.

Q. You had no complaints against him?

A. No.

Q. He was an honest man?

A. That I couldn't tell you whether he was honest or not. So far he is honest with us.

Q. He didn't cheat you?

A. I don't know that he cheat me.

Q. He didn't cheat the Green Mill out of anything? A. I couldn't tell you that.

Q. Didn't you have any receipt on this \$10,000 that you paid into the business?

A. The receipt must be misplaced. The only way that you can [104] do is collect the bank statements.

Q. Do you have your own bank statement?

A. We can get the check, if I check up.

Q. You have no objection to bringing that check into court, would you?

Mr. Waddoups: We will produce it if it can be found, Mr. Lee.

Mr. Lee: We will ask the Court to ask the respondents,——

The Court: If he can find it.

Mr. Waddoups: If we can find it we will pro-

(Testimony of Chong Hing Tenn.)

duce the evidence of payment being made,—be delighted to.

Q. Now, this price of the inventory, was that \$10,046.27?

A. I presume that is the inventory.

Q. I don't want any presumption. You were the one who handled the financial details of the Tenn brothers' business.

A. Yes.

Q. Don't you know what the inventory was?

A. That is the figure. It must be the inventory, that money that we owed. The purchase price was already paid. This was the balance here. We couldn't raise that money. We asked for the inventory, and we signed a note to mortgage the place.

Mr. Lee: We will offer this in evidence.

Mr. Waddoups: No objection, your Honor.

Mr. Lee: That is the note.

The Court: The mortgage and note of the Green Mill, covering what is supposed to be the inventory. What is the date of it? [105]

Mr. Lee: October 18.

The Court: 10-18-41. It will be received and marked Petitioner's Exhibit F.

Mr. Waddoups: Can't the note and the mortgage be received as one exhibit?

Mr. Lee: Yes.

The Court: One exhibit.

(The documents heretofore referred to were marked Petitioner's Exhibit F, and received in evidence.)

(Testimony of Chong Hing Tenn.)

PETITIONER'S EXHIBIT F

Honolulu, Hawaii,, 1941

\$10,046.25

For Value Received, we jointly and severally promise to pay to the order of Elsie Young Lum the sum of Ten Thousand Forty-six Dollars and Twenty-five Cents (\$10,046.25) with interest at Six per cent (6%) per annum from the date of this note until the whole sum has been paid in full.

Payments shall be made in five (5) equal monthly installments beginning with the 1st day of November, A. D. 1941. The whole amount of this note shall be paid in full on or before the 1st day of March, A. D. 1942.

Should default be made in any of the installments herein, then this note at the option of the holder hereof, may be accelerated and all installments shall then be due and payable.

Should it be necessary to place this note in the hand of an attorney for collection of any amounts due hereon, the undersigns agree to pay all costs and expenses incurred together with reasonable attorney's fees.

This note is secured by a chattel mortgage made this date by the undersigns as Mortgagor to Elsie Young Lum as Mortgagee.

/s/ KUI HING TENN,

/s/ CHONG HING TENN,

.,

Fook Hing Tong.

(Testimony of Chong Hing Tenn.)

Know All Men by These Presents: That we, Kui Hing Tenn, Chong Hing Tenn, of Honolulu, City and County of Honolulu, Territory of Hawaii, and Fook Hing Tong, of Wailuku, Maui, Territory aforesaid, parties of the first part and Mortgagors, being justly indebted to Elsie Young Lum, of Honolulu, City and County of Honolulu, Territory aforesaid, party of the second part and Mortgagee, in the sum of Ten Thousand Forty-six Dollars and Twenty-five Cents (\$10,046.25) which debt is hereby acknowledged, have for the purpose of securing the payment of said debt, do hereby sell, assign, transfer and mortgage unto the said party of the second part, her administrators and assigns, all our right, title and interest in and to the business of Green Mill Cafe, the merchandise, equipment and fixture therein, together with the lease of the said premises.

To Have and to Hold the same forever to the said Elsie Young Lum, her administrators and assigns forever, but subject however, to the express condition, that if we shall pay or caused to be paid unto the said Elsie Young Lum, her administrators or assigns, the full sum of Ten Thousand Forty-six Dollars and Twenty-five Cents (\$10,046.25) owed by us to her, which sum of Ten Thousand Forty-six Dollars and Twenty-five Cents (\$10,046.25) is to be paid in five (5) equal monthly installments according to the terms of that promissory note of even date, then these presents to be void, otherwise in full force and effect.

(Testimony of Chong Hing Tenn.)

And we do hereby covenant and agree to and with the said Elsie Young Lum that in case of default made in the payment of the promissory note above mentioned when the same shall become due; or if any attempt shall be made to dispose off or injure said property, then thereupon and thereafter, it shall be lawful, and we hereby authorize the said Elsie Young Lum, her administrators and assigns, or her agent to take immediate possession of said property wherever they may be found and to sell the same and all equity of redemption either at public or private sale, after giving at least five (5) days' notice thereof by writing to us, retaining such an amount for payments due or not due, a reasonable attorney's fee and such other expenses as may have been incurred in the advertising and selling of said property, returning the surplus money if any there be, to us, our administrators and assigns. If from any cause, said property shall fail to satisfy the above mentioned debt, cost and charges, we covenant and agree to pay the deficiency.

In Witness Whereof, we, the said parties of the first part, have hereunto set our hands this 18th day of October, A. D. 1941.

/s/ KUI HING TENN,

/s/ CHONG HING TENN,

/s/ FOOK HING TONG.

Filed June 22, 1948, Circuit Court, T. H.

Filed Oct. 12, 1948, Supreme Court, T. H.

(Testimony of Chong Hing Tenn.)

Mr. Lee: And also by stipulation of counsel, this assignment of the lease, dated October 30, 1941.

Mr. Waddoups: No objection to that being received.

The Court: Dated when?

Mr. Lee: October 30, 1941.

The Court: It will be received in evidence, and marked Exhibit G.

(The document heretofore referred to was marked Petitioner's Exhibit G, and received in evidence.)

PETITIONER'S EXHIBIT G

Assignment of Lease

This Indenture made this 30th day of October, A. D. 1941, by and between Lum Kam Hoo, a citizen of the United States of America, of Honolulu, City and County of Honolulu, Territory of Hawaii, hereinafter known as the "Assignor," party of the first part, and Kui Hing Tenn, and Chong Hing Tenn, both citizens of the United States of America and both of Honolulu, City and County and Territory aforesaid, and Fook Hing Tong, a citizen of the United States of America, of Wailuku, Island of Maui, Territory aforesaid, hereinafter known as the "Assignees," parties of the second part,

Witnesseth:

That for and in consideration of the sum of Ten

(Testimony of Chong Hing Tenn.)

Dollars (\$10.00) and other valuable consideration paid by the Assignees to the said Assignor and of the covenants and agreements to be performed and observed herein by the Assignees, the said Assigner does hereby assign, sell, transfer, grant and set over unto the said Kui Hing Tenn, Chong Hing Tenn and Fook Hing Tong, the Assignees, their heirs, executors, administrators and assigns, all his, the Assignor's right, title and interest in and to that certain Indenture of Lease dated the 16th day of September, 1938, as modified by that certain Indenture dated the 20th day of January, 1941, from National Clothing, Limited, an Hawaiian corporation, as Lessor, to Lum Kam Hoo as Lessee, of the premises situated at 1111, 1115 and 1119 Bethel Street, Honolulu and more commonly known as the Green Mill Cafe premises.

Subject, However, to the lease agreement and option to lease to John Lai of the premises Number 1119 Bethel Street, Honolulu.

To Have and to Hold the said premises unto the said Kui Hing Tenn, Chong Hing Tenn and Fook Hing Tong, their heirs, executors, administrators and permitted assigns, from the 1st day of October, 1941, for and during all the residue and remainder of said term in said lease specified, subject, nevertheless, to the lease agreement and option to John Lai and to the rents, covenants, conditions and provisions mentioned in said lease agreement dated September 16, 1938, and January 20, 1941.

(Testimony of Chong Hing Tenn.)

The Assignor does hereby covenant with the said Kui Hing Tenn, Chong Hing Tenn, and Fook Hing Tong, their heirs, executors, administrators and permitted assigns, that the covenants and agreements in said lease contained on the part of the Lessee to be observed and performed have been up to the date hereof duly observed and performed.

And for the consideration of said assignment the said Assignees do hereby covenant with the said Assignor, his executors and administrators, that they will henceforth pay the rent reserved and perform the covenants and agreements on the part of the Lessee to be performed in said lease agreements, and will keep the said Assignor, his executors and administrators indemnified against all actions, claims and liabilities for the non-payment of said rent or breach of said covenants and agreements.

In Witness Whereof, the said Lum Kam Hoo, Kui Hing Tenn, Chong Hing Tenn and Fook Hing Tong have hereunto set their hands the day and year first above written.

Assignor:

/s/ LUM KAM HOO.

Assignees:

/s/ KUI HING TENN,

/s/ CHONG HING TENN,

/s/ FOOK HING TONG.

(Testimony of Chong Hing Tenn.)

Territory of Hawaii,
City and County of Honolulu—ss.

On this 30th day of October, A. D. 1941, before me personally appeared Lum Kam Hoo, Kui Hing Tenn and Chong Hing Tenn, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[Seal] /s/ ELEANOR YOUNG LUM,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission expires June 30, 1945.

Territory of Hawaii,
County of Maui—ss.

On this 22nd day of November, A. D. 1941, before me personally appeared Fook Hing Tong, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[Seal] /s/ E. F. TAM,
Notary Public, Second Judicial Circuit, Territory
of Hawaii.

My Commission expires June 30, 1945.

(Testimony of Chong Hing Tenn.)

Consent is hereby given to the hereinabove described assignment.

NATIONAL CLOTHING,
LIMITED,

By
T. F. Farm,
President.

By
H. Tyau Akui,
Treasurer.

Filed June 22, 1948, Circuit Court, T. H.

Filed Oct. 12, 1948, Supreme Court, T. H.

Mr. Lee: And also by agreement, your Honor, the affidavit of publication which is published in the newspaper, the Honolulu Advertiser, by the owner of the premises, Elsie Lum, that she had sold the business as of October 1, to the three brothers, and published on October 23 and 24.

The Court: It will be received in evidence, and marked Petitioner's Exhibit H.

(The document heretofore referred to was marked Petitioner's Exhibit H, and received in evidence.)

(Testimony of Chong Hing Tenn.)

PETITIONER'S EXHIBIT H

In the Matter of
Non-Responsible Notice—Elsie Y. Lum

Affidavit of Publication

Territory of Hawaii,
City and County of Honolulu—ss.

Ernest Siu, being duly sworn, deposes and says, that he is Clerk of the Advertiser Publishing Company, Limited, publishers of The Honolulu Advertiser, a daily newspaper published in the City and County of Honolulu, Territory of Hawaii, that the ordered publication in the above entitled matter of which the annexed is a true and correct printed notice, was published two times in The Honolulu Advertiser, aforesaid, commencing on the 23rd day of October, 1941, and ending on the 24th day of October, 1941 (both days inclusive), to wit, on October 23, 24, 1941, and that affiant is not a party to or in any way interested in the above entitled matter.

/s/ ERNEST SIU.

Subscribed and sworn to before me this 24th day of October, A. D. 1941.

/s/ SUN YAN AMJONG,

Notary Public of the First
Circuit.

My commission expires June 30, 1945.

(Testimony of Chong Hing Tenn.)

Notice is hereby given that the undersigned has on the 1st day of October, 1941 sold all her right, title and interest in and to the business of Green Mill Cafe situated at 1111 Bethel street, Honolulu, to Kui Hing Tenn, Chong Hing Tenn and Fook Hing Tong and will not be responsible for any debts of said business hereafter.

/s/ ELSIE YOUNG LUM.

(Adv. Oct. 23, 24)

Filed Oct. 12, 1948, Supreme Court, T. H.

Filed June 22, 1948, Circuit Court, T. H.

Mr. Lee: And this is the partnership notice, also [106] stating that the business was,—that they entered into business as of October 1, 1941.

The Court: It will be marked Exhibit I, as in evidence.

(The document heretofore referred to was marked Petitioner's Exhibit I, and received in evidence.)

PETITIONER'S EXHIBIT I

In the Matter of Forming a copartnership under the name of Green Mill Cafe.

Territory of Hawaii,
City and County of Honolulu—ss.

Ernest Siu, being duly sworn, deposes and says, that he is Clerk of the Advertiser Publishing Com-

(Testimony of Chong Hing Tenn.)

pany, Limited, publishers of The Honolulu Advertiser, a daily newspaper published in the City and County of Honolulu, Territory of Hawaii, that the ordered publication in the above-entitled matter of which the annexed is a true and correct printed notice, was published two times in The Honolulu Advertiser, aforesaid, commencing on the 23rd day of October, 1941, and ending on the 24th day of October, 1941 (both days inclusive), to wit, on October 23, 24, 1941, and that affiant is not a party or in any way interested in the above-entitled matter.

/s/ ERNEST SIU,

Subscribed and sworn to before me this 24th day of October, A.D. 1941.

/s/ SUN YAN AMJONG,

Notary Public of the First
Circuit.

My commission expires June 30, 1945.

Notice is hereby given that Kui Hing Tenn, Chong Hing Tenn and Fook Hing Tong, all of Honolulu, have on the 1st day of October, A.D. 1941, entered into a copartnership for the carrying on of a restaurant and liquor business under the firm name and style of "Green Mill Cafe," situated at 1111 Bethel Street, Honolulu, Hawaii.

/s/ KUI HING TENN,

/s/ CHONG HING TENN,

/s/ FOOK HING TONG.

(Adv. Oct. 23, 24.)

(Testimony of Chong Hing Tenn.)

Affidavit of Publication

Filed October 12, 1948, Supreme Court, T. H.

Filed June 22, 1948, Circuit Court, T. H.

Q. Now, did you instruct Hiram Fong to draw up the articles of partnership prior to October 1, 1941? A. Yes.

Q. You entered into the partnership on October 1, 1941. Did you instruct Hiram Fong to draw up articles of partnership before October 1, 1941?

A. Before that? No.

Q. Before that; no.

A. We didn't instruct him.

Q. Yesterday you didn't say who told the lawyers to draw up these papers?

Mr. Waddoups: He said that he thought that he did.

A. You asked me a different thing.

Q. All right. Let me ask you this question: Did you instruct Mr. Fong to draw up the articles of copartnership concerning this business, or was it somebody else?

A. I don't remember whether I instructed him.

Q. You don't remember?

A. I don't remember whether I instructed him or he suggested to us to have the partnership drawn up.

(Testimony of Chong Hing Tenn.)

Mr. Lee: No further questions.

Mr. Waddoups: That's all.

(Witness excused.) [107]

Mr. Lee: May we have a short recess for a minute? We want to contact a party at LeRoys.

The Court: Very well.

(Recess.)

Mr. Lee: If your Honor please, these two parties from Leroy's just arrived, and I would like to have them excused for just a minute. I had Mr. Chong Hing on the stand for a minute and let him go without asking one question. With counsel's and the court's permission, may I ask one more question?

Mr. Waddoups: I have no objection.

CHONG HING TENN

a respondent herein, was recalled, and testified as follows:

Further Direct Examination

By Mr. Lee:

Q. You testified the other day that Hung Chin Ching was down at the Green Mill. Was he assisting you in handling this business before you consummated this final deal? Was he helping you?

A. Yes. He came in and tried to help me.

Q. What did he do? What was the understanding?

(Testimony of Chong Hing Tenn.)

A. He was supposed—he was going to quit the police force and come over there and work.

Q. That was the understanding? That was developed at your home? Was that that conference, the family conference? Is that correct?

A. Yes.

Q. It was also the understanding after that conference that you were supposed to get \$250 besides your interest in the business? [108]

A. That was agreed.

Q. Mr. Ching, when he quit the police department, was also to get \$250 pay at the Green Mill?

A. Yes.

Q. Is that true? A. Yes.

Q. That was the understanding? A. Yes.

Q. All of this agreement—that took place at your family home, did it? A. Yes.

Q. Mr. Ching did work around there with you, is that correct?

A. Yes. He was there for I don't know how long. A few days, I think, or a week.

Q. Wasn't it about a month?

A. Well, I don't remember.

Q. Three weeks to a month? Approximately?

A. He just didn't show up any more.

Q. Did you folks pay him anything?

A. Two weeks or something. I don't know.

Q. Did he get any pay?

(Testimony of Chong Hing Tenn.)

A. Well, we didn't pay him anything.

Q. Did they pay you \$250? A. Who paid?

Q. I mean the copartnership. Did you receive any pay besides your interest in the copartnership?

A. Yes.

Q. How much were you paid at the beginning?

A. \$150. [109]

Q. \$150? A. Yes.

Q. \$150 or \$250?

A. \$150 or \$250. I don't remember.

Q. It was about \$250, wasn't it?

A. Check up with the records on the book.

Q. Will you check up the records so that I can ask you about it tomorrow morning? A. Yes.

Q. Now, I also asked you about Kam Tai Ching. He is dead.

Mr. Lee: If your Honor please, may I have the original file?

Q. I will show you here an affidavit which is a part of the record, attached to the petition, the original petition, sworn to by Kam Tai Ching, and I want you to read this, a copy of which is in my file.

Mr. Waddoups: Does counsel propose to make evidence out of this affidavit?

Mr. Lee: No, your Honor. We will offer it in evidence later. I just want him to read it first.

Q. Was Kam Tai Ching bookkeeper for Mrs. Elsie Lun, who operated the Green Mill before you folks came into the picture, as he swore under oath? He was, wasn't he? A. Yes.

(Testimony of Chong Hing Tenn.)

Q. And also continued to serve as a bookkeeper after the transfer of the business to Fook Hing Tong, Chong Hing Tenn, and Kui Hing Tenn and Hung Chin Ching as partners? Is that statement true or false? [110]

A. I don't know how he got Hung Chin Ching as a partner.

Q. Is that statement true or false, or is it partly true and partly false?

Mr. Waddoups: Is this an attempt to discredit this witness? If it is, I am going to object on relating to any statement made by Kam Tai Ching, on the ground that no proper foundation has been laid; that the witness is not available for cross-examination. That is an affidavit attached to the bill where he is not here to give proof is not evidence and could not be considered evidence. It would be prejudicial to attempt to make it such. It is improper to try to show what somebody else said before his death is false.

The Court: It is asking something about what somebody else said. You can ask him directly whether or not this man was anything that is set out in this affidavit, but to ask whether or not what the client says is true or false is improper, it seems to me.

Mr. Waddoups: That's correct.

Mr. Lee: Well, your Honor, it is an unfortunate thing that this man is dead.

The Court: Yes. You can ask him if this man was a partner.

(Testimony of Chong Hing Tenn.)

Mr. Waddoups: That's easy, but not what somebody else said he was.

Mr. Lee: Well, if your Honor please, it is a matter of permitting the question. I don't see any objection——

The Court: The court does and will sustain it.

Mr. Lee: All right, your Honor. [111]

Q. Did you and Hung Chin Ching take exclusive charge and manage this business for a period of six weeks at the time that you folks bought this business? A. No. Not six weeks.

Q. About how many; three weeks?

A. Two weeks, three—two weeks.

Q. About two weeks? A. Yes.

Q. Wasn't Hung Chin Ching in charge of the sales, and of hiring and firing all employees? You were in charge——

The Court: Wait a minute. Did you get the answer to that question?

Mr. Waddoups: No.

The Court: Let's get the answer to the question.

A. You mean that he is in charge?

Q. Yes. That was the agreement?

A. That was the agreement, yes.

Q. It was also agreed that you would handle the proceeds of the sales and the banking of moneys, which you did, isn't that true? You handled all the cash of the business?

A. After that thing is transferred or before?

Q. Well, this is just before, during the operation of the business, both before——

(Testimony of Chong Hing Tenn.)

A. Before, when the owner is still there yet, we take charge, him and I check up.

Q. But it was after October 1st, the agreement, wasn't it after October 1st?

A. No. October 1st, the owner still have a lien on that place yet until all the documents is all transferred, then I [112] took complete charge.

Q. I still don't know when the partnership took place.

A. When the liquor was transferred, then it took place.

The Court: You mean the liquor license?

A. When it was transferred and the papers were drawn up there.

Q. Was that on October 10, 1941?

A. Somewhere around there.

Q. Now, this division of duties, did that continue beyond October 10, 1941, from the time that the liquor commission granted the license?

A. I think he was there.

Q. Both before and after, wasn't it?

A. I think so. He was there yet, I think.

Mr. Lee: No further questions.

Recross-Examination

By Mr. Waddoups:

Q. Did he do any work around that place after he took his trip to Maui?

A. No. Never came back any more.

Q. Was he there just prior to the time that he

(Testimony of Chong Hing Tenn.)

went to Maui, a few days before that time, was he still there?

A. Yes. He was there. He never show up for a week.

Q. Did he do any drinking around that establishment? A. When he first came in, yes.

Q. Did you have trouble over that?

A. We had a little trouble over that.

Q. By "he" I mean Ching. [113]

A. Ching.

Q. Did he do any drinking around that establishment? A. Yes. He drinks.

Q. Did you and he have any pilikea over his drinking?

A. I objected to it, because the regulation is pretty strict.

Q. He never came back there after his trip to Maui? A. No.

Mr. Waddoups: That's all.

Redirect Examination

By Mr. Lee:

Q. I forgot to ask you one more question: did you receive a letter from your brother, which is Petitioner's Exhibit A-1? Did you receive this letter from Fook Hing Tong, your brother?

A. I think so.

Q. Well, you did, didn't you? A. Yes.

Q. Did you receive this letter a few days after he wrote it, approximately, within a reasonable time?

(Testimony of Chong Hing Tenn.)

A. I think so. It came direct to me.

Q. Direct to you? A. Yes.

Q. Is it true that he said that he didn't—that he received word that you were not holding to your end of the bargain as agreed upon by the whole family? “We talked it over, now I find out that you are trying to run everything your way.”

A. Yes.

Q. “Please understand that I have H. C. Ching there to look out after my interests and that your position was to take care of the finances and the monetary end. You and he are the sole [114] administrators there and that you take care of the above and Ching handles the personnel. I am acquainted with H. C. Ching and to be frank I would not put up the money if it had not being for the fact that Ching was instrumental in getting the business for us and further let us be frank that if Ching is not there, I would like you to buy me out. I did not finance you the last time on the Motor Coach Cafe, knowing that you have plenty to learn about business, and I repeat that if H. C. Ching was not helping to handle this business I would not go in. So that is my intention that you abide by what was consummated at the verbal conversation held at home. If you think you can handle the place by yourself you can have my shares, but I cannot afford to spare that much cash for you to promote any business. I hope this makes it plain to you what my sentiments are. Sometimes too much money and being too busy gets into a fel-

(Testimony of Chong Hing Tenn.)

low's head and he gets all excited. Tell Dick to stay away from there and not meddle around too much with the waitresses or the personnel."

Mr. Waddoups: Well, are you asking him? I think we are wasting the court's time to just read it.

Mr. Lee: That's all right. I would like to impress it upon him here and see whether or not he agrees with this.

A. You want an answer to it?

Q. Yes.

A. Well, just as Mr. Waddoups says, that he had been drinking. You can't get along with a man drinking on the job, and taking liquor away, so I went and ran it myself to protect the business.

Q. That was what the fight was about?

A. Sure. [116]

Q. Between you and Ching?

A. The license would be taken away.

Q. Was that the reason why you people got him out of the partnership?

A. There is no partnership made yet. He is supposed to bring the money. I understood the money is supposed to be waiting, for money to have the deal closed. He could not produce. I asked my brothers what they think about it. "No cash, no dice."

Q. When you asked your brother that, which brother are you talking about?

A. Fook Hing Tong.

Q. He was on Maui at the time?

(Testimony of Chong Hing Tenn.)

A. Corresponding. When he comes in I said, "I got no money yet."

Q. Your brother Fook Hing Tong was on Maui on October 1, wasn't we, at the time that this partnership was supposed to have been consummated?

A. I think so. I don't remember. He lives in Maui.

Q. Did you go and see Hiram Fong at the time that you had this dispute with Hung Ching Ching?

A. No.

Q. To draw up the articles of copartnership?

A. I don't remember. I went to see Hiram Fong.

Q. You never saw Hiram Fong about drawing up the papers in partnership?

A. When things were ready, Hiram Fong called me up and said, "What are you going to do?"

Q. When was that, was that about October 6, or before that?

A. Around the month of October.

Q. That is the first part or the first week? [116]

A. During the month of October. I couldn't remember the date. The date shows when the partnership was drawn. That must be the date.

Q. Well, now, you say that you and Ching were operating this business for about two weeks. Was that also in October?

A. That was in October, yes.

Q. The first two weeks in October?

A. Yes. That is the first of October.

Q. I see. And when did you sign the articles of copartnership?

(Testimony of Chong Hing Tenn.)

A. I don't remember the date. It shows in there.

Q. When did you have any conversation with Hiram Fong about drawing these partnership papers?

A. October.

Q. Was it in the first week of October?

A. The first or the second. I think after the liquor—the approval of the transfer. Then we can writing the partnership. Otherwise we——

Q. How do you account for the fact that Hiram Fong prepared the bill of sale prior to October 10 to only the three brothers which you filed with the liquor commission, that was in evidence here?

A. I account for that when you do business, when you get the cash down, you have to put the cash down. The other fellow can come in and the owner can wait, eh?

Q. You didn't pay Mr. Lum, did you, until——

A. The first payment was made on the——

Q. ——October 15, wasn't it? When was the first payment made?

A. October 1, I think. [117]

Q. Before you took over? October 1st?

A. Yes.

Q. (By Mr. Lee): Mr. Waddoups, this copy of the bill of sale which was filed before the liquor commission—we have a bill of sale which was in evidence now, dated October 20—this one is dated October 10. We haven't got a copy of this bill of sale in evidence.

The Court: Well, is it any different?

(Testimony of Chong Hing Tenn.)

Mr. Lee: No. It is the same thing, only a different date.

The Court: As I understood from the testimony of Mr. Thompson from the liquor commission, that was the bill of sale.

Mr. Waddoups: That's correct. After the transfer they insisted on another one.

The Court: Proposed bill of sale.

Mr. Lee: Is that one that was filed with the liquor commission that is dated October 10, the one that is on file?

The Court: Yes. It appears that the liquor license was transferred on the 10th.

Mr. Lee: That's correct, your Honor.

The Court: So that there is nothing in the record that would seem to need straightening out, because the one filed with the liquor commission, it was understood that it was not the bill of sale, but only the proposed bill of sale that was to be executed. We have in the record a bill of sale that was executed. It is the same as that.

Mr. Waddoups: Except for the dates.

Mr. Lee: Well, may this copy be received, which is [118] on file with the liquor commission, which is the same thing in the records, without calling Mr. Thompson back, unless Mr. Waddoups—

Mr. Waddoups: No. We don't object to it.

The Court: Very well. It will be received as Exhibit J.

(The document heretofore referred to was marked Petitioner's Exhibit J, and received as evidence.)

(Testimony of Chong Hing Tenn.)

PETITIONER'S EXHIBIT J

Rec'd by Liquor Com. October 20, 1941.

Indenture made this 10th day of October, A.D. 1941, by and between Elsie Young Lum, of Honolulu, City and County of Honolulu, Territory of Hawaii, party of the first part and Vendor, and Chong Hing Tenn, Kui Hing Tenn and Fook Hing Tong, all of the same place, parties of the second part and Purchasers,

Witnesseth:

That for and in consideration of the sum of Ten Dollars (\$10.00) and other valuable consideration in hand paid by the Purchasers to the vendor, the full receipt whereof is hereby acknowledged, the Vendor does hereby sell, assign, transfer and set over unto the purchasers, their administrators and assigns, all her, the Vendor's right, title and interest, in and to the business of "Green Mill Cafe" located at 1111 Bethel Street, Honolulu, City and County and Territory aforesaid, together with all the furniture, fixture, equipment and good will of said business.

To Have and to Hold the same unto the Purchasers, their administrators and assigns forever.

And the Vendor does hereby for herself, her administrators and executors, covenant and agree to and with the said Purchasers, their administrators and assigns, that she has good title to said property; that they are free and clear from all encumbrances and that she will Warrant and Defend the

(Testimony of Chong Hing Tenn.)

above described property hereby sold unto the Purchasers, their administrators and assigns, against all and every person whomsoever lawfully claiming title thereto.

In Witness Whereof, the Vendor hereto has hereunto set her hand the day and year first above written.

/s/ ELSIE YOUNG LUM.

Acknowledged on the 10th day of October, A.D. 1941.

ELEANOR YOUNG LUM,
Notary Public.

Filed Oct. 12, 1948, Supreme Court, T. H.

Filed June 22, 1948, Circuit Court, T. H.

Q. As a matter of fact, it was you who hired Hiram Fong, wasn't it, to act as attorney for the purchase in handling the bill of sale and the transfer of the liquor license and everything else?

A. I think so. Of course, I don't know I hired Fong directly. My brother knows him very well. He has been his attorney. He has been Lum's attorney. One attorney do the whole thing.

Q. So the file concerning the Green Mill, Hiram Fong's legal file—all these documents concerning the thing was in your file in Hiram Fong's office, wasn't it? A. All in Hiram Fong's office.

(Testimony of Chong Hing Tenn.)

Q. Didn't he give you the file when this case came about? A. I went and asked him.

Q. And you turned it over to Mr. Waddoups, the attorney in this case, isn't that true?

A. Yes.

Q. Now, in this transaction at the time, back at the time, your brother Fook Hing Tong was the fellow who had—he was more or less calling the shots in this thing. He was the big boy. He had the money? [119]

A. He had his share. I have my share.

Q. You at one time prior to this tried to interest him in the Motor Coach Cafe, didn't you?

A. Yes.

Q. And he refused to go in with you, isn't that true?

A. Well, he didn't refuse absolutely. We did some checking. I forgot about it. I went home. I went home in the country. I didn't stay down here.

Q. This statement by him, Fook Hing, that you and Hung Chin were the sole administrators there, and that Hung Chin was supposed to handle the personnel, that was according to the verbal agreement? A. Yes.

Q. At your home? A. Yes.

Q. Where the three of you were present with Mr. Ching and your father? A. Yes.

Q. Isn't that true? A. Yes.

Q. So this thing that he is referring to is merely the particular thing that you people had agreed upon? A. His working?

(Testimony of Chong Hing Tenn.)

Q. At that conference at the home it was also agreed among you brothers, etc., that Hung Chin Ching was supposed to put up \$3,000 as his share into the business, isn't that right? A. Yes.

Q. You people were there, you understand that?

A. Yes. [120]

Q. In other words, everybody agreed to that, all the three brothers, with Mr. Ching, including the brother Fook Hing Tong, that Hung Chin Ching was supposed to put in \$3,000 as his share, and he would quit the police department work and get \$250, besides, just like you? A. Yes.

Q. Wasn't that the agreement? Your answer is "Yes"? A. Yes.

Q. And calling your attention to this agreement, by the time that you got this letter, which was a little after October 6, 1941, because it is dated October 6, 1941, you had already instructed Hiram Fong to draw up these partnership papers and exclude Mr. Ching, isn't that true?

A. Which partnership?

Q. The partnership among your three brothers. Hadn't you already instructed Hiram Fong to draw up the partnership papers excluding Mr. Ching as one?

A. He never put up his money. So he was excluded.

Q. You had already told Hiram Fong, before October 6, 1941, to exclude Hung Chin Ching, isn't that right?

(Testimony of Chong Hing Tenn.)

A. I told Hiram Fong? I don't remember if I have told him that. October 6th? October 6th?

Q. Wasn't it before October 6th that you told Hiram Fong?

A. After that, I think, maybe, not before October 6th. We just took over October 1. He was there a few days, just waiting for the money to close our business. No. I don't think I told him before that.

Q. When did you have this pilikea about the drinking at [121] the place?

A. The first day.

Q. The first day? A. Yes.

Q. That was October 1? A. Yes.

Q. About October 1st? A. Yes.

Q. About the drinking? A. Yes.

Q. From then on, your relations with Hung Chin Ching was,—while he was over there at the place were very bad? A. Not real bad.

Q. About how would you characterize them?

A. I said to run a business like that, nobody can stand it. I have to protect my interest in it.

Q. You didn't want him around?

A. I didn't fire him. No. I didn't want him around. I just held on. You have the letter there.

Q. You couldn't fire him, because at the time, on October 1st, he was to be a partner, wasn't he?

A. October 1st?

Q. Yes. You couldn't fire him, could you?

A. I could if I had the majority.

Q. No, but you didn't have the majority, did you? Did you have the majority?

(Testimony of Chong Hing Tenn.)

A. I didn't ask for it.

Q. Well, do I take it to mean that you didn't have the [122] majority?

A. I didn't try and find out if I could get it.

Q. If you could get the majority? A. Yes.

Q. Did you think of firing Hung Chin Ching the first day? A. No.

Q. At the time you had not raised your \$10,000 supposedly, had you, on October 1st, I am talking about? A. Not yet, no.

Q. The only fellow who had raised any money at the time was Fook Hing Tong, on October 1st. He had left \$10,000 with Kui Hing before he went to Maui? A. Yes.

Q. Isn't that true?

A. Kui Hing and Fook Hing Tong, yes. \$15,000 was put in.

Q. So they put in the whole \$15,000? Or was that put in by Fook Hing Tong?

Mr. Waddoups: That has been gone over at least five times. Fook Hing Tong put in \$10,000, and the other man \$5,000.

The Court: Objection sustained.

Mr. Lee: Later, Fook Hing Tong, one of the respondents in this case stated that he put in \$15,000. Now, on examination Fook Hing Tong states that he actually only put in \$10,000.

The Court: This man has testified that the doctor put up \$10,000, and Kui put up \$5,000.

Mr. Waddoups: Correct.

(Testimony of Chong Hing Tenn.)

Mr. Lee: Well, I know, but it seems to me very relevant,——

The Court: It is relevant, but we have gone over [123] it three or four times. It is the same thing. I want to get through with this.

Mr. Lee: I am not prolonging the case. This is the gist of the whole case.

The Court: The court feels that this has been gone into amply and sufficiently. It has been covered not once, but two or three times. This is the third time that this witness has been recalled to the witness stand. Let's move on to something that is new and different.

Mr. Lee: Well, your Honor, I am trying to get the dates, because the dates are very important as to the element of agreement among the parties. This witness has been very evasive up to this point. It finally came out and was admitted that there was this agreement at the home as to the prosecution of their duties. This is the first time that he ever admitted,——

The Court: The court has ruled. Proceed.

Q. Now, Chong Hing Tenn, do you recall how many conversations you had with Hiram Fong on this partnership thing? A. Once or twice.

Q. Once or twice. Did you have a conversation with him on October 1st, at which time you instructed him to draw up partnership papers?

A. October 1st?

Q. That is the date that you had the dispute with Hung Chin Ching about his drinking?

(Testimony of Chong Hing Tenn.)

A. I don't remember if it was October 1st or not.

Q. Was it about that time, the next day, or a few days afterwards? [124]

A. Drawing the partnership? No. After. Away after that.

Mr. Lee: All right. No further questions.

(Witness excused.)

ELSIE YOUNG LUM

called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lee:

Q. State your full name.

A. Elsie Young Lum.

Q. Are you married? A. Yes.

Q. What is your husband's name?

A. Henry Lum.

Q. Do you know the petitioner, Hung Chin Ching? A. Yes.

Q. How long have you known him?

A. Mostly for about maybe ten years. I don't know.

Q. Are you acquainted with Fook Hing Tong, Chong Hing Tenn, and Kui Hing Tenn?

A. Yes.

Q. When did you first know the Tenn brothers?

A. When they bought our business in 1940.

Q. Was that in 1941?

(Testimony of Elsie Young Lum.)

A. 1940. The latter part of 1940.

Q. I will come to the date later. At any rate, the records here show that you applied for a transfer of your liquor license on October 6, 1941?

A. It has been so long that I don't remember. Maybe it is. [125]

Q. At any rate, it would be about this date, the date that you applied for a transfer of the liquor license?

A. October.

Q. October 6, 1941?

A. Yes.

Q. About that time did you sell the place?

A. Yes.

Q. Now, Mrs. Lum, were you the former owner of the business known as the Green Mill?

A. Yes.

Q. Is that business located on Bethel Street?

A. Yes.

Q. To wit, 1111 Bethel Street?

A. Yes.

Q. How long did you own that business?

A. I think about six years.

Q. In 1941, who was running the business for you, was it you and your husband or somebody else?

A. My husband and I.

Q. About the same time in 1941, was your husband very ill?

A. Yes, he was not feeling well. He was sick.

Q. He was a sick man?

A. Yes.

Q. So you were running the business by yourself at the time?

A. Some of the time, part of the time.

Q. Did you have some help?

(Testimony of Elsie Young Lum.)

A. Most of the time, anyway.

Q. You had some help? A. Yes.

Q. Did you decide to sell your business at the time? [126] A. Yes.

Q. Did Mr. Hung Chin Ching come to see you about buying that business?

A. I think my husband was resting at home, and he wanted to talk to him about buying the business.

Mr. Waddoups: Were you there?

A. At home? I worked down at the store.

Mr. Waddoups: I move to strike that answer.

The Court: It will be stricken.

Q. Now, did you sell your business?

A. I did.

Q. Did you have any conversation,—yourself, I am talking about, not your husband,—with Hung Chin Ching or the Tenn brothers regarding the sale, who was buying this?

A. I didn't have any conversation.

Q. Most of the conversation was done by your husband? A. Yes.

Q. Now, Mrs. Lum, do you recall whether or not Hung Chin Ching or Chong Hing Tenn came over there and operated the business on a trial basis before the sale was consummated? A. Yes.

Q. Was that some time in October, 1941, or the latter part of September, 1941, or thereabouts?

A. Somewhere around there.

Q. It was understood that they would have exclusive charge of running the business there?

Mr. Waddoups: I object to this as leading, if your Honor please.

(Testimony of Elsie Young Lum.)

The Court: Sustained. [127]

Mr. Waddoups: Counsel has had great latitude on this. I suggest that he let the witnesses testify for a change.

Q. Well, did you see Mr. Hung Chin Ching, and Chong Hing Tenn come over there to operate the business?

A. When we sold the business, we have to go to the liquor commission, see. We have to have a meeting. I went out to meet with the Tenn brothers. The commissioner said yes, they would let them take over the business.

Q. Did they come over there and operate the business at all before the final sale was completed?

A. Yes, for a while, anyway, until the meeting.

Q. Yes. How long did they operate it?

A. I don't remember. It was a couple of weeks until the meeting, or something like that.

Q. Now, did you go down there yourself to help him operate the business?

A. We waited around.

Q. Did you see Hung Chin Ching there?

A. Yes, sometimes he is around.

Q. Did you see Chong Hing Tenn there?

A. Yes. He is down there.

Q. Both of them were there? A. Yes.

Q. Did you see what they did, respectively? What did they do around the place?

A. Well, they ran the business there.

Q. They ran the business. Was it both of them or just one of them?

(Testimony of Elsie Young Lum.)

A. Well, Chong Hing was there; sometimes Mr. Ching came in. [128]

Q. Mr. Chong, did you understand he handled the cash? A. Mr. Chong handled the cash.

Q. Chong Hing Tenn? A. Yes.

Q. What did Mr. Ching do?

A. I don't know.

Q. Was he around quite often during those two weeks? A. Yes. He was around.

Q. How much did the business sell for?

A. \$25,000, plus the inventory.

Q. How much was paid down?

A. I think \$15,000 was paid down.

Q. \$15,000 was paid down? A. Yes.

Q. Do you recall when that \$15,000 was paid?

A. I don't remember the date exactly.

Q. Was that paid about the time that they went in and operated the business?

A. Yes. There was a down payment until the commissioner okayed the business.

Q. In other words, they made a down payment of \$15,000? A. Yes.

Q. And the agreement would go through when the liquor commission approved the transfer of the liquor license? A. Yes.

Q. Between the time, as I get it, Mrs. Lum,—at the time that they made the down payment, the \$15,000, they were operating the business about two weeks before the liquor commission [129] approved it, is that right? A. Yes.

Q. When the deal was approved, or the transfer

(Testimony of Elsie Young Lum.)

of the liquor license was approved by the liquor commission, was the other \$10,000 paid?

A. Yes.

Q. How much was the inventory?

A. About \$10,000, I think.

Q. Did they pay that?

A. No. They had to pay it monthly. We had a note.

Q. Who did you sell the business to? Who did you think that you sold the business to?

A. Well, it was Chong brothers, all of them, I suppose, went in.

Q. Was Mr. Ching supposed to have an interest in there?

A. In the beginning there was an understanding.

Q. Well, I am talking about that time, not now.

A. Yes, he was supposed to be one of the partners

Mr. Waddoups: Just a minute. No. Go ahead. I will get it on cross-examination.

Q. Who handled the financial end of your business, was it you or your husband?

A. Well, you mean the transaction of the business?

Q. Yes.

The Court: You mean the sale of the business? Is that what you mean?

Mr. Lee: Yes.

A. We had Mr. Hiram Fong take care of our business.

(Testimony of Elsie Young Lum.)

Q. Do you recall whether there was a small deposit made first [130] to bind the deal?

A. I don't know. I don't recall.

Q. You don't recall it? A. No.

Q. You have your books, they were subpoenaed?

A. I don't have any records. Whatever records there was are down at the lawyer's office.

Q. You mean Hiram Fong's office?

A. Yes.

Q. Did you get or did you attempt to get the records from Hiram Fong's office?

A. Well, I called him last night, but he said that he gave them to Chong Hing.

Q. Chong Hing Tenn? A. Yes.

Q. You mean the personal file?

A. No. It was the sale, whatever was there.

Q. Would that file have any receipts to show when that \$15,000 was paid exactly and received?

A. I don't know. I guess so. It was made out in a check.

Q. Yes. Was it cashed when you received it, or did you hold it? A. It was in a check.

Q. Did you people hold it?

A. We held it until the commissioner okayed it; then we deposit it.

Q. Now, by the way, was business good at the time that you sold? A. Very good. [131]

Q. Why was it that you sold?

A. Well, my husband wasn't feeling well, and the doctor ordered for him to rest. We were thinking about selling.

(Testimony of Elsie Young Lum.)

Mr. Lee: No further questions.

Cross-Examination

By Mr. Waddoups:

Q. As a matter of fact, Mr. Lum, you participated in none of the details of arranging this deal, did you?

A. No. Most of the detail was arranged by my husband.

Q. It was taken care of by your husband in a conference with Mr. Fong? A. Yes.

Q. Did you ever enter into any agreement with Mr. Ching to sell or for the sale of these premises?

A. No. I haven't talked to him.

Q. You never had any conferences with him?

A. Well, he told me he was one of the partners there.

Q. Was that the only information that you had about Mr. Ching having an interest in this business? A. Yes.

Q. So that the only information that you had about Mr. Ching having an interest in this business came from Ching himself, is that correct?

A. It is so long, I don't remember.

Q. You know, don't you, that you didn't sell to Mr. Ching? A. Yes.

Q. You were aware of the fact at the time that you signed the bill of sale? [132]

A. Well, we had a lawyer, see. Mr. Fong took

(Testimony of Elsie Young Lum.)

care of all the affairs, so I didn't pay much attention to it.

Q. Was Mr. Ching in Fong's office when these things were cleared up? A. I suppose so.

Q. Have you been up in Mr. Fong's office with Mr. Ching? A. I have not.

Q. So that you don't know whether he ever got in on these conferences in Mr. Fong's office or not, is that correct? A. I don't know.

Q. You yourself never had any conferences with him in which you agreed to sell him any part of this business? A. No.

Q. Now, where did you signed these papers? Where did you sign the bill of sale?

A. I don't remember.

Q. Was that in Mr. Fong's office?

A. I suppose so.

Q. Well, I don't know. I am asking you.

A. Well, it has been so long. I don't remember.

Q. I appreciate that. We don't expect anybody to be perfect. I will call your attention to Petitioner's Exhibit C, purporting to be a bill of sale from yourself to certain parties. Will you examine that?

A. It is just a note on the inventory, isn't it?

Q. Will you read that please? You can read, can't you? A. A little bit.

Q. Is that your signature at the bottom of [133] it? A. A little bit.

Q. Is that your signature at the bottom of it?

(Testimony of Elsie Young Lum.)

A. Yes. It is, but I don't remember where I signed it.

Q. You don't remember whether it was at your home? A. No. I couldn't recall that.

Q. I call your attention to Petitioner's Exhibit F, and I ask if you recognize this document?

A. I do.

Q. That is a note, isn't it, that was given to secure the payment for the inventory?

A. Yes.

Q. This mortgage was what was given to secure the note, is that correct? A. Yes.

Q. Were you present when this was executed, do you remember? A. I guess so.

Q. Do you still have the original of this document?

A. Well, I don't know. I think so. It is so many years. We throw things away. I don't usually keep them. I throw anything away we don't want.

Q. Do you recall whether or not you kept the original of this note and mortgage, or whether or not you left it with Mr. Hiram Fong?

A. I don't remember. I really don't remember if I had it at home or left it there.

Q. In any event, as you went through the process of carrying this deal out, you left it up to Mr. Hiram Fong and followed his advice, because he was your lawyer, is that a fair statement? [134]

A. Yes.

Q. I don't know whether I asked you this or not, Mrs. Lum, but do you know whether or not

(Testimony of Elsie Young Lum.)

Mr. Ching was present at any of these conferences in Mr. Fong's office?

A. I don't remember. I don't know.

Q. On this occasion when you went to the liquor commission, was Mr. Ching along with you?

A. I don't remember. It is so long.

Q. You said the Tenn brothers, Chong Hing Tenn and Kui Hing Tenn.

A. I remember that they were there.

Q. You don't know whether Mr. Ching went along with you or not? A. No.

Q. Did you know at the time that you executed these documents that the Tenn brothers were the ones who were buying the property up there?

A. Yes.

Q. You realized at the time that Mr. Ching's name did not appear on any documents?

A. I don't know what the decision between them was.

Q. No. On the documents that you signed?

A. No.

Q. Did you realize at the time that you executed them, at the time that you signed them, that Mr. Ching's name did not appear on these papers?

A. I have not thought about it.

Q. You read it over, didn't you?

A. Yes. [135]

Q. Before signing?

A. Yes. I knew that I was signing the deal with the Tenn brothers.

(Testimony of Elsie Young Lum.)

Q. You knew that you were dealing with the Tenn brothers? A. Yes.

Redirect Examination

By Mr. Lee:

Q. What did you think about at the time that you signed, about Ching?

Mr. Waddoups: I object to what she thought about Ching as being incompetent and irrelevant. What she thought about Ching has no bearing on these respondents.

Mr. Lee: It is very important.

The Court: Objection sustained.

Q. Now, did you read that document at the time that you signed—I am talking about the time that you read the document—you read the document at the time?

A. It has been so long, most of the conversation with talking between my husband and them, you know. I really didn't bother.

Q. You don't know whether you assigned it to Ching or the Tenn brothers?

A. No. I don't recall.

Mr. Lee: No further questions.

(Witness excused.) [136]

LUM KAM HOO

called as a witness on behalf of the petitioner,
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lee:

Q. What is your name, please?

A. Lum Kam Hoo.

Q. How do you spell your last name?

A. H-o-o.

Q. Were you the former owner of the business
known as the Green Mill? A. Yes.

Q. Is that the business up at Bethel street?

A. Yes.

Q. Now, do you know the petitioner Hung Chin
Ching? This man sitting here? A. Yes.

Q. How long have you known him?

A. From 1924.

Q. From 1924? A. Yes.

Q. Now, about September, 1941, did you decide
to sell your place?

A. Yes. The doctor told me to give up.

Mr. Waddoups: Well, I thought it was her
business?

The Court: It is all in the family, I guess.

Q. The business was in your wife's name?

A. My wife's name. [137]

Q. Who ran that business?

A. Me and my wife.

Q. You and your wife. Were you a sick man at
the time? A. Yes.

(Testimony of Lum Kam Hoo.)

Q. Did Mr. Ching come to see you about buying this business?

A. Yes. One day, in the afternoon, Ching come to see me to buy me out. I thought he was kidding me.

Mr. Waddoups: Will you speak a little louder please, so that I can hear you.

A. I thought Ching was kidding me. A couple of days later he bring Mr. Tong and come over.

Q. What Tong is that? Fook Hing Tong?

A. Doctor Tong come in, and he said, "We are interested."

Q. He said they were interested? A. Yes.

Q. Did you talk about the price there at the time?

A. Yes. Ching come and ask me how much. I said for the business \$25,000, that is besides the inventory.

Q. What took place next?

A. Then later, one evening they come out to the house there.

Q. Who came out to your house?

A. The whole family.

Q. Whose family?

A. Mr. Chong, Doctor Tong, and the old man come. Late.

Q. Late? A. Late in the evening.

Q. Tell the court what took place.

A. They want to find out all the details of my place. Then [138] they said they decide to buy.

(Testimony of Lum Kam Hoo.)

Ching hand check to me. He said maybe deposit, he want to buy place.

Mr. Waddoups: What was that last?

A. Ching handed check for me.

Q. You mean Ching handed you the check? He wanted to buy?

A. Yes. I told him, "Well, I do business through Hiram Fong, let him handle it, and the bookkeeper."

Q. Who is the bookkeeper?

A. Kam Tai Ching.

Q. You say let who handle it?

A. Hiram Fong.

Q. What next?

A. The next few days, give one check to Hiram Fong, I don't know, \$15,000. That time the bookkeeper and Hiram do it.

Mr. Waddoups: Speak slowly. This man has to write it down.

The Court: Talk up loud.

A. That time bookkeeper and Hiram do it.

The Court: From that time our bookkeeper and Hiram do it.

Q. After the \$15,000 was paid down, did you come down to the Green Mill?

A. Once in a while I drop in. My wife all the time handle.

Q. Did you and your wife continue to handle the business? A. Yes.

Q. Who else was in there handling the business?

A. I know afterwards Ching go there, my wife there. We promise handle two or three months.

(Testimony of Lum Kam Hoo.)

We give them a hand [139] for a while, show them how to run the business. I told my wife to go in and see Ching in the night.

Q. That is Hung Chin Ching, you saw Ching there during the night?

A. Yes. During the night.

Q. What was he doing?

A. He was manager, you know.

Q. He was managing that business there?

A. Yes. We had to take inventory, see. Anything bottle open we take. He want to take inventory on the case.

Q. You mean Hung Chin Ching?

A. So Ching, the bookkeeper, figured the inventory, and I see the bookkeeper, open bottle no count.

Q. Why opened bottle no count?

A. Because we give. Ching behind bar take inventory. So Ching tell me, "O. K.?" I said, "Forget about it, o. k." "O. K."

Q. Hung Chin Ching told you to forget about the bottles?

The Court: The opened bottles.

Q. Why did you say "O.K." on the opened bottles? Wasn't there a lot of them?

A. Yes. Some of them.

Q. Aren't they worth money? A. Oh, yes.

Q. Why did you forget about it?

A. They take the whole case.

The Court: You what?

(Testimony of Lum Kam Hoo.)

A. Take it by the case.

Q. You were good friends with Hung Chin Ching? [140] A. The whole family.

Q. Was it because you were good friends with Hung Chin Ching that you said to forget about the opened bottles.

Mr. Waddoups: We object to that.

The Court: Sustained.

Q. Why did you tell Mr. Ching to forget about the opened bottles?

A. Because it was a small thing, eh.

Q. Were you present at the liquor commission when they had the hearing for the transfer of the liquor license? A. No. I never go down.

Mr. Lee: Your witness.

. Cross-Examination

By Mr. Waddoups:

Q. Did you handle all the details in connection with this sale? A. Yes.

Q. How old are you? A. 48.

Q. Where were you born? A. Honolulu.

Q. Lived here all your life?

A. No. I went back, and came back again.

Q. When did you last come to Honolulu?

A. I came back in 1921.

Q. You were not one of the 1300? Were you one of the so-called 1300? You know what I am talking about, don't you? A. No.

Q. All right. Did you have any conferences up

(Testimony of Lum Kam Hoo.)

in Hiram [141] Fong's office? A. No.

Q. Never went to Hiram Fong's office in connection with this sale?

A. I give power of attorney with Hiram, and Hiram and my bookkeeper handle it.

Q. Your bookkeeper is dead now?

A. Yes.

Q. Did you give the power of attorney to Hiram Fong himself? A. To the bookkeeper.

Q. Did you see these papers that your wife signed before they were executed?

A. I told them to let Hiram handle the whole thing.

Q. I call your attention to Petitioner's Exhibit 1, and ask you if have seen this document before. Look it over, please?

A. I am home at the time. I never see anything.

Q. As a matter of fact, you were home most of the time that this thing was going on?

A. Yes. I let Hiram handle it.

Q. You were sick at the time. So really the only one that knows about this, from your statement of the thing, is Hiram? A. Yes.

Q. Is that correct? A. Hiram.

Q. He handled all these things? A. Yes.

Q. You authorized him to act in your [142] behalf? A. (No response.)

Q. Had you advised your wife that she should let Hiram handle it, too? A. Yes.

Q. So that everything that was done in connec-

(Testimony of Lum Kam Hoo.)

tion with this sale of this business was done through your lawyer, Hiram Fong? A. Yes.

Q. And your bookkeeper? A. Yes.

Q. Do you know who that business was sold to?

A. It was sold to Hing Tong. I believe it was the copartners that come to my house.

Q. Do you know who bought it?

A. I know there was four of them, Tong family, and Ching.

Q. Do you know—have you ever seen these papers before? A. No.

Q. So you don't know who bought this business, is that correct, of your own knowledge?

A. Well, only coming to my house and talking about it, the four of them.

Q. At the time that they came to your house to talk about it, it was your understanding that Ching was going to go into the business too, is that correct? A. Yes.

Q. So I understand that you thought that right along?

A. I don't know, Hiram handled the whole thing.

Q. Now, this check that Ching gave you, when was that [143] delivered?

A. In my house.

Q. You said that he gave you a check?

A. Yes, in my house.

Q. How big? A. A few hundred dollars.

(Testimony of Lum Kam Hoo.)

Q. How many? A. \$500 for deposit.

Q. Did you give Ching a receipt at the time?

A. No. As I say, "I couldn't give you any receipt. Let Hiram handle it." Call Hiram, but not home.

Q. So you didn't accept the check that Ching offered you at the house?

A. I told him to go to Hiram's office.

Q. Do you remember whose check it was; who signed that check?

A. I seen Doctor Tong sign the check and turn it over to Ching, he handed it to me.

Q. It was Doctor Tong's check that was offered to clinch the deal? A. Yes.

Q. You said, "I can't handle it here"; you called Hiram Fong, and he wasn't home, and nothing more was done. You let the deal go until later?

A. Yes.

Q. How many times did you see Ching, together with the Tenn brothers?

A. From the time that they move down to the restaurant? [144]

Q. But how many times did you see them in conference prior to the time that they took over the restaurant?

A. Most every day, down at the restaurant.

The Court: No. Before.

Q. Before they went into the restaurant, while you were home sick? A. I never seen them.

Q. Just one time?

(Testimony of Lum Kam Hoo.)

A. Just one time. Only talk to Ching, come down for lunch.

Q. Well, you saw them then? A. Yes.

Q. Then didn't they come up another time, the next night, or was it the same night?

A. No. Different night, about two or three days later.

Q. They came up, these three gentlemen there, and their father and Mr. Ching? A. Yes.

Q. That was the last time that you saw them at your house? A. Yes.

Q. Then the next time you saw Ching on any business was down at the Mill?

A. Yes. Only time with Tenn talk, the other time.

Q. Then you saw Ching in there once in a while at night? A. Yes.

Q. How often did you go down?

A. As soon as we leave, Ching take over with Tenn.

Q. When was this, if you recall, was this in September, 1941? A. Something like that.

Q. How long before the transfer of the liquor license, [145] if you remember when that happened?

A. I don't remember how long, a month or so.

Q. A month or so? A. Yes.

Q. After the transfer of the liquor license, after the business was sold, you didn't go there any more, is that correct?

A. No, because we give them a hand, my wife

(Testimony of Lum Kam Hoo.)

drop in by the day, and Tenn and Ching handle the license.

Q. How long a period of time did your wife drop in?

A. My wife stay in in the morning until night, in the afternoon.

Q. You were sick during this time?

A. No. I drop in, yes, almost close up time. My wife come down, and I come with her to take a ride.

Q. How many days did that go on?

A. Over two months.

Q. Over two months? A. Yes.

Q. How long a period of time elapsed between the time that you had your first conference with Ching and Doctor Tong, and the time that the business was sold?

A. About three or four months.

Q. Three or four months? A. Yes.

Q. That is the best of your recollection?

A. I met Doctor Tong and Ching.

Q. As a matter of fact, you don't know of your own knowledge [146] just when this deal was closed, is that correct? Do you understand my question?

A. The deal closed on—they handled the check from the deposit. I believe it was closed that same night.

Q. Had you transferred the liquor license?

A. After the liquor license o. k.

(Testimony of Lum Kam Hoo.)

Q. Had there been a bill of sale that night?

A. No. I told Hiram to handle it.

Q. So far as you were concerned, after that night, that was all Hiram's kuleana?

A. That's right.

Q. You just depended on Hiram to do everything?

A. Yes.

Q. The details you don't know?

A. No.

Mr. Waddoups: That's all.

Redirect Examination

By Mr. Lee:

Q. So far as you are concerned, the deal was closed that night?

A. Yes. That night.

Q. When the family came over?

A. Yes.

Q. The only thing left was for Hiram Fong and your bookkeeper to handle the details?

A. Yes.

Q. And you say, also, that you and your wife helped them during the day?

A. Yes. [147]

Q. In the operation of the business?

A. Yes.

Q. At night Ching, and Chong Hing Tenn came over there to run the business, is that right?

A. Yes.

Mr. Lee: No further questions.

Mr. Waddoups: May I ask one more question on this.

(Testimony of Lum Kam Hoo.)

Recross-Examination

By Mr. Waddoups:

Q. Has Ching made any claim against you or against your wife, to your knowledge, for failing to sign this business over to you?

A. You mean Ching, before that?

Q. No. Has he ever made a claim against you?

A. After?

Q. Afterwards?

A. The only thing I mention Ching, one time he mention about who I want to see.

Q. No. Answer the question. Has he made a claim against you for money, or for damages?

A. No.

Q. For your refusal to sign this property over to him?

Mr. Lee: That is objected to, your Honor. There is no evidence here showing that this man refused to sign the business over to Ching.

The Court: There is no evidence, except he claims there were to be four partners originally. It appears that [148] the documents only assigned it over to three.

Mr. Lee: Yes, your Honor.

The Court: Objection overruled.

Mr. Waddoups: Did he answer that question?

The Court: Yes. He said no claim for damages.

Mr. Waddoups: That's all.

Mr. Lee: That's all.

(Witness excused.)

HUNG CHIN CHING

the petitioner herein, having been first duly sworn,
testified as follows:

Direct Examination

By Mr. Lee:

Q. State your name?

A. Hung Chin Ching.

Q. Are you the petitioner in this case?

A. I am.

Q. What is your occupation?

A. Police officer, City and County of Honolulu.

Q. How long have you been connected with the
police force?

A. Going on 16 years, this year.

Q. Steady, is that correct? A. Yes.

Q. Were you born in the Hawaiian Islands?

A. Yes.

Q. An American citizen? A. Yes.

Q. Are you married? A. Yes. [149]

Q. Children? A. Yes.

Q. How many? A. One.

Q. Where do you live?

A. 2131 Dole street, Honolulu.

Q. How long have you lived there?

A. 23 years.

Q. Do you own the place there? A. Yes.

The Court: That is what they call the Chinese
Hollywood?

A. That's right.

Q. When did you purchase that place?

(Testimony of Hung Chin Ching.)

A. 1925 I built it.

Q. You built it? A. Yes.

Q. So that you owned the place that you were in, in the year 1941? A. Yes.

Q. In the month of September, 1941, approximately, did you own that property free and clear, or was there any mortgage?

A. It was not clear.

Q. How much was owing?

A. \$2,000 mortgage on the property.

Q. How much did you build that house for?

A. \$6,200.

Q. How much did you pay for the lot?

A. \$1,650 in 1925. [150]

Q. So actually it cost you about \$7,800 and something, is that correct?

A. \$1,650, plus \$4,700 for the home.

Q. Altogether \$6,350? A. Yes.

Q. Was the house furnished? A. Yes.

Q. Was the furniture paid for? In September, 1941? A. Yes.

Q. Now, were you employed in the police department in the year 1941? A. Yes.

Q. What was your rank?

A. I was sergeant of police.

Q. How long had you been sergeant of police up to September, 1941?

A. I was made sergeant of police in 1937, August.

Q. In September, 1941, how much were you making? A. About \$200.

(Testimony of Hung Chin Ching.)

Q. A month? A. Yes.

Q. Now, in September, 1941, did you know Doctor Fook Hing Tong? A. Very well.

Q. When did you first make his acquaintance?

A. I knew Doctor Tong at the Emergency Hospital. He came out there. I happened to be around there.

Q. What year was that? A. 1941. [151]

Q. 1941. A. The early part of 1941.

Q. He testified that he knew you a couple of years before that, could that be possible?

A. It could be possible, about 1940, the latter part of 1939 or 1940.

Q. You knew him, anyway, before September, 1941? A. Yes.

Q. Did you become very friendly with him?

A. Yes, very friendly with Doctor Tong.

Q. Mr. Ching, were you interested in 1941 in purchasing a liquor establishment?

A. I was interested.

Q. Did you know of the rules of the police department about police officers owning an interest in liquor establishments?

A. Yes, if we go into the liquor business, we must resign our job.

Q. Were you ready to resign your job at the time if you purchased a liquor establishment?

A. If I had purchased an establishment, I would have resigned.

Q. What did you do yourself in seeking to

(Testimony of Hung Chin Ching.)

achieve that end, going into a liquor establishment, in 1941?

A. I heard that the Pearl Inn, on north King street, right near Dillingham Boulevard was for sale. I also learned at the time, in 1941, about August, that Mr. Murakami was the owner of that establishment.

Q. Was he the person who came here this morning? [152]

A. He is the person who appeared as the first witness this morning.

Q. Proceed and tell the Court.

A. So I approached Mr. Murakami, and I asked him whether the premises was for sale, and he told me it is for sale. So I asked him what would be the price for the lease and the good will, and at first he wanted \$35,000.

Mr. Waddoups: I object to this. All this is hearsay, having nothing to do with the instant case. The fact that he has testified, and I think properly, that he went down and made an offer to buy the Pearl Inn is all right, but now what Mr. Murakami said to him, or what the terms of that proposed sale were, certainly have nothing to do with the issues before the court on this matter. This is wasting the court's time.

The Court: So far as he was interested in the purchase, I can see that, but what the terms of the deal were I don't see that has anything to do with this. Objection sustained.

(Testimony of Hung Chin Ching.)

Q. Did you complete that deal with Murakami?

A. No.

Q. Why wasn't it completed?

Mr. Waddoups: I object to that as incompetent, irrelevant and immaterial, having nothing to do with the instant case.

The Court: Sustained.

Q. Was it completed, or wasn't it completed?

A. It was not.

The Court: He said it was not. [153]

Q. Did you make any other efforts to obtain a liquor establishment?

A. One day I dropped in Doctor Tong's home. He just came down to Honolulu from Maui.

Q. What month was that?

A. The early part of September.

Q. 1941?

A. 1941. He asked me what I was doing. I told him I just almost closed a deal with the owner of a liquor establishment, that I was interested in going into the liquor business. And he told me, "You are just the right man to talk with about the liquor business." He wanted to know whether I can go around and look for a place to buy. So that evening, Doctor Tong and myself went around town. We went to the Cafe Venice first and looked at the place. It was full of customers there, very busy. We had a talk with Mr. Suganaga, and we asked him if the business was good, and he said yes. From there we went to the Riverside Grill, the same night, Doctor Tong and myself. We met

(Testimony of Hung Chin Ching.)

Mr. K. C. Wong. So we asked him whether the liquor business was worth while going into, and if there is any place for sale at the moment. He said the liquor business is good, we should go into it and devote all our attention to the business.

Q. Did he mention anything about whether or not he knew any place was for sale?

A. He told me that he believed the Green Mill was offered for sale.

Q. Was that said in the presence of Doctor Tong? [154]

A. I am sure it was said to Doctor Tong. So immediately after that we went up to the Green Mill. I introduced Dr. Tong to Mr. Lum Hoo, the witness here. We talked about business. And he offered to sell for \$30,000 at the start, not \$25,000. He wanted \$30,000, plus the inventory. Later we went back to Doctor Tong's home in Bingham Tract, in the presence of his dad, his brother, Chong Hing, and I believe his mother was there, and we discussed about going into the liquor business and purchasing the Green Mill Grill on Bethel street. The older Mr. Tong was very happy I was there. He said that I should join with the boys and get into that venture. Then we finally decided to go and see Lum Hoo at his residence on Lewalani street.

Q. You say that Doctor Tong was present at that conference at the home?

A. That's right.

(Testimony of Hung Chin Ching.)

Q. And you say that his brother——

A. Mr. Chong Hing Tenn. I don't remember that Kui was there.

Q. He testified that he was there.

A. One of the other brothers was there.

Mr. Waddoups: At this time, in order that the record may be clear, may I move to strike that portion of this narrative answer of this witness, where he mentioned that the father, the elderly father of the respondents said that he thought that the petitioner should go into a partnership venture with them. That is not binding on them. It is not evidence in this case.

Mr. Lee: I thought he said it was the [155] doctor.

The Court: No, the father. It will be stricken.

Mr. Lee: It was in the presence of the others.

The Court: In the presence of the other. That is not binding. If one of these respondents said it, it would be different.

Mr. Waddoups: Did the record show the motion was granted?

The Court: Yes.

Mr. Waddoups: I didn't hear it. Thank you.

Q. (By Mr. Lee): Was there any agreement among the brothers and you as to going into this venture, and how much capital?

A. There was an oral agreement whereby I was to put up \$3,000 and the rest of the brothers put in the rest of the capital. It also was agreed at that

(Testimony of Hung Chin Ching.)

meeting that Mr. Chong Hing be the treasurer, because they have the biggest interest in the venture. I was to manage the personnel and the projection of the business.

Q. What about your job with the police department?

A. It was also agreed that I was to quit the police department.

Q. When the deal was consummated?

A. That was the agreement, our agreement made at the time.

Q. Were you to be paid anything?

A. It was also agreed by Mr. Chong Hing that he was to get \$250, to be the manager of the finances in the business, and I was to draw a salary of \$250 in running the business, together with Mr. Chong Hing, in addition to my partnership.

Q. Was there anything said at that meeting as to whether you people were going to buy for \$30,000 or \$25,000? Anything [156] of that sort?

A. First Lum Hoo wanted \$30,000. Later on, I don't know how he came down to \$25,000, because it was agreed at the meeting at the home that Chong Hing was the treasurer, he was going to take care of all the legal business of this venture.

Q. He was to take care of the financial end?

A. The financial.

Q. Mr. Chong Hing Tenn?

A. Mr. Chong Hing Tenn.

Q. Was there anything said about when the money was to be paid in by the parties?

(Testimony of Hung Chin Ching.)

A. No. Nothing was said as to when the money was to be paid in.

Q. Was there anything said when you were supposed to put the \$3,000 in?

A. Never said anything to me as to when to put the \$3,000 in.

Q. Was it subject to Mr. Chong Hing's call?

A. At any time, subject to his call.

Q. Was that the agreement of the parties at the time? A. That was the agreement.

Q. So far as you are concerned, then, you were supposed to contribute your \$3,000 when Chong Hing notified you?

A. Whenever the papers were ready, when the business was about to be consummated.

Q. Now, you say that the next night that you people went over—— [157]

Mr. Waddoups: I would suggest that counsel let his own witness testify.

The Court: It is 12:00 o'clock. We will take a recess until 8:45 tomorrow morning.

(Whereupon the matter was adjourned until 8:45 o'clock a.m. June 23, 1948.) [157½]

June 23, 1948, 8:45 o'Clock A.M.

Mr. Lee: May the record show that the petitioners are ready to proceed.

Mr. Waddoups: We are ready to proceed for the respondents.

HUNG CHIN CHING

the petitioner herein, was recalled, and testified as follows:

Direct Examination

By Mr. Lee:

Q. Yesterday we got so far as the conference at the Tenn home. Now, to bring it up to that point, let's see if I have got it straight. When was the first meeting that you had with Mr. Lum, the proprietor of the Green Mill, was that the time that you and Doctor Tong went to see him, or did you have an earlier conference with him?

A. I had an earlier talk with him, it was about the latter part of August, or the early part of September, when I happened to drop around there for lunch, and he asked me in a joking way, he said, "Do you want to buy my business?"—meaning the Green Mill.

Mr. Waddoups: I object to anything that transpired between this petitioner and Mr. Lum in the absence of the respondents, as not being binding upon the respondents, if your Honor please. What Mr. Lum said to him is purely hearsay, or what he asked him.

The Court: I think that the fact that he con-

(Testimony of Hung Chin Ching.)

versed [158] with him with reference to the sale may stay in, not what the conversation was.

Mr. Lee: That's correct.

Q. You had an earlier conference with him?

A. Yes. He said——

Q. Never mind what he said. Counsel has objected to what he said. You had a conference concerning the sale of the Green Mill with Mr. Lum, and that was prior to your conference with Mr. Lum with Doctor Tong? A. Yes.

Q. Yesterday you told about the conference with Mr. Lum and with Doctor Tong, and then you proceeded thereafter to the conference at the Tenn home. Now, tell the court what took place at that conference.

The Court: That is at the Tenn home?

Q. At the Tenn home.

A. Yes. Yes. That evening Mr. Chong Hing, Doctor Tong, myself, the father, and I believe Kui Hing was there, too, and D. Hing, the other brother.

Q. There was another brother, D. Hing?

A. Yes, and we talked about how to purchase this business from Mr. Lum, that is, the Green Mill. And then and there we decided to form a partnership. Then we discussed the terms of the partnership. I told them at the time that the price is \$30,000. That is what Mr. Lum wanted. I told them I could only contribute \$3,000 to buy that business, they are to take care of the rest of the finances. And then Doctor Tong and his brothers,

(Testimony of Hung Chin Ching.)

they agreed to take care of the balance of the sum, that purchase price. [159]

Q. I see. Now, did you people discuss the duties on the part of the——

A. We also agreed at that meeting at the house, at the conference, that Mr. Chong Hing Tenn would be the financier, the treasurer of this partnership, because I told him that he got the most share in the business, they should take care of the cash on a salary of \$250 a month, and I am to take care of the personnel and the projection of the business, the promotion of the business, at a salary of \$250 a month.

Q. Who proposed your end of the deal? Did you propose it yourself, or was it one of the brothers? Do you recall?

A. I proposed that I be paid a salary higher than the police salary I was getting.

Q. And you were getting \$200 a month?

A. \$200 a month. Then we decided when to see Mr. Lum.

Q. I see. Just a moment before you get to that. How about the other two Tenn brothers, were they to have any duties at the Green Mill?

A. Doctor Tong said he would like to have his brother, Kui Hing, in the partnership, if there was no objection, and he was to contribute his share, whatever that is. I didn't know at the time.

Q. There was no objection to Kui Hing at the time?

(Testimony of Hung Chin Ching.)

A. No, the partnership was formed then and there.

Mr. Waddoups: If your Honor please, I will move to strike that last statement as being a conclusion of this witness, and a legal conclusion.

The Court: That would be stricken. The court would have to decide that. [160]

Mr. Lee: Yes, your Honor.

The Court: That is his idea.

Mr. Lee: His idea, that's correct.

A. The father was very happy, and he told us in the presence of—in the presence of Doctor Tong, Chong Hing and Kui Hing Tenn——

Mr. Waddoups: If your Honor please, that has been already ruled on, the question as to what he said, as to his idea.

Mr. Lee: Well, that's the father?

A. Yes.

Mr. Lee: I will have that stricken.

Q. At any rate, Mr. Ching, was Doctor Tong to spend any time in running the business?

A. If I remember correctly, he said, "I will leave it all to you fellows"—that is Chong Hing and myself to run the business. He didn't know anything about it.

Q. In other words, you and Chong Hing were to run the business, is that correct? A. Yes.

Q. Now, you said something about going to see Mr. Lum. Will you please tell the court what was done with respect to seeing Mr. Lum?

A. , We called up Mr. Lum by 'phone.

(Testimony of Hung Chin Ching.)

Q. Who called him up?

A. I called him up by telephone.

Q. Where did you call?

A. From Mr. Tenn's home. [161]

Q. Was that right after the conference?

A. Yes. We went to see him about purchasing the business.

Q. Was Mr. Lum at home when you called?

A. He was at home. He said, "Come up." They got in my car, and we went up to Mr. Lum's home.

Q. Just a minute, "they" got into your car. Who got into your car?

A. Chong Hing, Doctor Tong, his father, except Kui Hing. He didn't go.

Q. He didn't go? A. No. And myself.

Q. Did all of you go in one car?

A. In one car.

Q. In whose car? A. My car.

Q. Who drove the car? A. I drove it.

Q. Did you then proceed to Mr. Lum's home?

A. Yes. We proceeded to his home.

Q. Did you get there?

A. We got there.

Q. When you got there, what happened?

A. Mr. Lum invited us into his home. Then we sat on the sofa, and starting talking business. I think I told him the price of \$30,000 was a little bit too high, he should come down a little bit, because we have to buy the inventory, and that is a considerable amount more than we anticipated.

(Testimony of Hung Chin Ching.)

So he finally came down to \$25,000. Then Doctor Tong wanted me to give him a [162] check. I think it was \$200 as an option. Then Mr. Lum refused to take it. He said, "I prefer to have my counsel, my lawyer, Hiram Fong, take care of the legal end of the deal. Just as long as Mr. Ching"—that is myself—"is in the partnership, that is good enough for me," that I am honorable, he trust me. So the sale was made then and there at the home, of the business.

Mr. Waddoups: I move to strike that, too, your Honor, as being again a conclusion of this witness.

The Court: It will be stricken as a conclusion.

Q. Was that amount of \$25,000 agreeable to you and the Tenn brothers at the time?

A. It was agreeable at the time.

Q. Was that \$25,000 agreeable to Mr. and Mrs. Lum at the time?

A. It was agreeable; at the time it was agreeable to them.

Q. Did you people remain at the Lum home after this incident or did you leave immediately?

A. Well, we shook hands around and he offered some drinks. We had several drinks and we talked a little while. I don't know whether I should say this or not, but the old gentleman said something to Mr. Lum about——

Q. You mean after? A. After, yes.

Mr. Lee: The court has ruled anything that he said would not be admissible.

Q. Then you folks left the Lum home?

(Testimony of Hung Chin Ching.)

A. We left the place.

Q. Was there anything said, Mr. Ching, anything else said [163] concerning the business or the operation thereof?

Mr. Waddoups: By whom?

Mr. Lee: By Mr. Lum.

A. Yes. Mr. Lum said that he would be happy to let us—that is, Chong Hing Tenn and myself, and the other brother, that is, Doctor Tong and his brother, operate the business on an experimental basis for two weeks to see whether we liked it or not. If we liked it, all right, otherwise he would take the business back if we didn't want it.

Q. Now, did you and the Tenn brothers agree to Mr. Lum's offer in helping operate the Green Mill?

A. We agreed to his suggestion and invitation.

Q. Did you and Mr. Tenn—Chong Hing Tenn, thereafter proceed in the operation of the business?

A. About the middle of September we went down to the Green Mill to learn the business; Mr. Chong Hing was taking care of the cash that was coming in, and he was back of the cash register. I was on the floor, looking around the premises, meeting my friends. Once in a while when Chong Hing is away elsewhere, I go back of the cash register and take in the receipts. Then occasionally when Mr. Chong Hing is not around the meeting company would deliver meat, and the tobacconist would bring the tobacco. He would bring the bill

(Testimony of Hung Chin Ching.)

and he would tell me to pay it out of the cash register, and that was done. Then I talked to the girls. I know most of these girls there.

Q. You mean what girls?

A. The waitresses. I told them to cooperate with us, we were going to buy the business. [164]

Q. What time did you go to the Green Mill?

A. At the time I had day watch. I worked from 8:00 in the morning until 4:00.

Q. The day watch where?

A. Down in the police department. As soon as I am through with my police duties I put on my civilian clothes and go right on up to the Green Mill and work there.

Q. Now, did that arrangement work out well during the trial period?

A. Very nice. We took inventory a few nights later.

Q. Tell us about the inventory. Who was there?

A. It was after the close of business, about 11:30, I think. We closed a little early that night. The man from the Hawaii Liquor Commission was there. He has been an expert on liquor. He was advising Mr. Chong Hing. I was there. Mr. Lum was there, so was his wife, Elsie, Mrs. Lum. The bartender was there, and if I am not mistaken Kam Tai Ching was there.

Q. You mean the bookkeeper for Mr. Lum?

A. Yes. If I remember correctly, Mr. Chong Hing went down to check the cases of liquor in the warehouse down in the basement and I helped take

(Testimony of Hung Chin Ching.)

inventory back of the bar on these loose bottles. Kam Tai Ching was tabulating. Then there was lots of partially filled bottles, some almost to the top, some half, some a quarter filled. There was a considerable number of these bottles back of the bar and on the shelves. Later on Mr. Chong Hing came up and asked Mr. Lum whether he was going to include that in the inventory. There was a little haggling on whether they should be included or not. I told Mr. Lum it is a small thing, to forget about it. After [165] all, we are spending a lot of money buying this business. So he finally consented not to include these partially filled bottles.

Q. Mr. Chong Hing Tenn testified about October 1, about the first day, that you were doing a lot of heavy drinking at the Green Mill, and he stated that was no way to make the venture a success, have you anything to say about that?

A. I would say it was an untruth, for the simple reason I was on the floor most of the time, people coming in and I invite them to have a drink, for the business. Once his dad comes around and waits outside. I figured that he has got some consideration, too, and I invite him in and pour him a drink; maybe I have a drink with him. But I never got drunk or intoxicated in the establishment.

Q. Did you have trouble then with Chong Hing concerning the operation of the business?

A. Well, I didn't have any trouble directly with him. In other words, I didn't go up to him and complain. During the latter part of September,

(Testimony of Hung Chin Ching.)

while we were practicing or learning, these couple of waitresses come up to me and told me——

Mr. Waddoups: Just a minute. I object to what any waitresses told him as being hearsay.

The Court: You had a conversation with a couple of waitresses. That is as far as you can go.

Q. What were those conversations? What were they, good things, or were they complaints about anything?

Mr. Waddoups: I object to that as calling for hearsay.

The Court: Objection sustained. He has a conversation. [166] What he does as a result of it is a different thing.

Q. You had a conversation with a couple of waitresses? A. That's right.

Q. As a result of this conversation with a couple of the waitresses, what did you do, if anything?

A. That night, when I went home I wrote a letter to Doctor Tong, and in the letter stating that Mr. Chong Hing is not doing the right thing. He is interfering with my duties as a man who was in charge of personnel, butting in, telling the waitresses what to do. They don't like it. I would like him to inform the brother to abide by his agreement made at the conference at the house as to the partners.

Q. So you wrote that letter?

A. I wrote the letter.

Q. Did you receive a letter back from Doctor Tong, Petitioner's Exhibit A?

(Testimony of Hung Chin Ching.)

A. And I received a letter from him.

Q. Is this it?

A. This is the letter I received from Doctor Tong. There was my letter attached to it.

Q. You received this petitioner's Exhibit A?

A. Yes.

Q. You also received with that Petitioner's Exhibit A, this thing, did you?

A. Yes, I did. It was attached, stapled to the other letter.

Q. This is Petitioner's Exhibit A-1?

A. Yes.

Q. Now, that letter is dated October 6, [167] 1941? A. October 6.

Q. Approximately when did you receive that letter?

A. I couldn't tell you now. It was delivered to the YMCA.

Q. Do you recall whether there was any air mail service at the time?

A. There was air mail service.

Q. Was this air mail? Let me show you this envelope. Was this by regular mail?

A. A three cent stamp. It must be by regular mail.

Q. After you received this letter from Doctor Tong, how did you feel?

A. Fine. It was very good. But when I went back to work there was a certain chilliness shown me by Mr. Chong Hing. He tried to avoid me; wouldn't talk.

(Testimony of Hung Chin Ching.)

Q. Now, you kept on with your duties, did you not? A. I did.

Q. Will you tell the court what happened next?

A. Well, I continued to work there. I proceeded to the Green Mill when my tour of duty was over at 4:00 o'clock, at the same job, meeting people, introducing them to the new owner, the new partners, new business.

Q. You mean Chong Hing?

A. Yes. He was the only one down there. Mr. Lum was there. But she used to run the place. And he told me, "You see these folks there? That is the crew of the US Chicago, destroyer, these are my good friends. They use this place as a club."

Mr. Waddoups: I object to this, anything that Lum told him being incompetent, irrelevant and immaterial and hearsay. [168]

The Court: Objection sustained to anything with reference to the USS Chicago.

Q. Those two weeks went by. What happened next?

A. About the 20th of October—I think about the 20th—I happened to be walking on Merchant Street, and I saw Hiram Fong's sign up there, and I thought I would drop up and see what the progress was made in the drawing up of the partnership papers. I met Hiram in the office, and I said, "Hello, Hiram, how is the papers getting along?" He said, "You are out. You are not in the partnership, according to the instructions I have." So I said, "Let me use that 'phone of yours, I want to

(Testimony of Hung Chin Ching.)

call Doctor Tong.” I called him up right away, in fact, I just remembered that yesterday, somebody reminded me, that I still owe that bill. I called Doctor Tong and I said, “What is it you folks are up to, anyway?” He asked me to come up and see him.

Q. Who asked you to go up?

A. Doctor Tong, over the radiophone. So I got hold of my lieutenant, and I said, “I have got something very important, I want to get off an extra day to go to Maui. I remember there was the first DC3 passenger flight ever made to Maui. The doctor met me at the wharf and took me to the house. Then later on Will Centio came around, a fellow officer, I mean, who was on vacation up there at the time. I told Doctor Tong that is not the right thing to do. Prior to that—may I just go back?

Q. Go ahead.

A. When I heard of this ouster of me from the partnership, I got hold of Lum, too. I called him up after I talked with Doctor Tong. [169]

Q. Who do you mean?

A. The owner. I said, “I want to see you, Long John.” Before I saw him, I went to see Doctor Pang.

Mr. Waddoups: I object to anything that was said to Doctor Pang.

The Court: Objection sustained.

Mr. Waddoups: Not binding on the respondents.

(Testimony of Hung Chin Ching.)

Q. So you went to see Doctor Pang, anyway. After you saw Doctor Pang, what did you do?

A. I went to see Long John, and I said——

Mr. Waddoups: I object to anything that was said to Long John, not being binding on the respondents. There is no evidence anyone of them was there. Purely a self-serving declaration, if your Honor please.

The Court: Well, he has testified as to what he said to Long John, and his reaction. Objection overruled. Long John being present at the time, and the person from whom it was purchased, in the purchase that they all negotiated according to this testimony, on the sale of these premises.

Q. You went to see Long John?

A. I went to see Long John. I asked him, "Say, have you seen the papers from the sale?" He said, "Aren't you in it?" I said, "No. They put me out." He said, "It's too late now, they have already signed the bill of sale." I went up to Maui, anyway, to see Doctor Tong. Doctor Tong told me this, he said, "Forget about it, Ching. Later on when I get something, or an enterprise, you come in with me."

Q. Did that satisfy you?

A. No. That didn't satisfy me. So, we had a few drinks. [170] He took me to Lahaina and I came back that night. He was very nice. He wanted me to stay that night at the house. I didn't want to. I wanted to come back. That same night Centio and I got passage and come back to Honolulu.

(Testimony of Hung Chin Ching.)

After I came back, I was so doggoned mad—excuse the language, please—I was just very mad over the whole situation. I went back there a couple of days.

Q. Where did you go back?

A. I went back to the Green Mill a couple of days.

Q. You mean that you continued your work?

A. Yes, then finally it dawned on me, what's the use? My brother Hung Wai Ching called me——

Mr. Waddoups: I object to what Hung Wai Ching said.

Mr. Lee: I will ask that be stricken, also.

The Court: It will be stricken.

Q. At any rate, you received a call from Hung Wai Ching? A. Yes.

Q. As a result of that call, what happened?

A. Well, I was upset. I didn't feel right. I was ridiculed by people.

Q. Did that have anything to do with this exhibit here, showing the publication of the sale of the business to Kui Hing, Fook Hing Tong and Chong Hing Tenn?

A. He called attention to the publication of the partners, and he said, "Your name isn't in it. What's the matter?"

Mr. Lee: That's all right. Leave out that portion. That will be stricken—concerning the notice.

A. There was some kind of notice of partnership published [171] in the paper.

(Testimony of Hung Chin Ching.)

Q. And that your name wasn't in it, is that correct? A. That's right.

Q. After that did you then leave the Green Mill?

A. I figured what's the use, if they are going to treat me like that, I am going to let their conscience be their guide. That is the way I felt. They are good friends of mine, honorable gentlemen. Why should they do a thing like that to me? I don't like to go to court.

Q. In the testimony of Chong Hing Tenn, particularly, he stated that they were waiting for the money from you. Now, what was the understanding?

A. It was agreed that he was supposed to notify me when the tender is ready.

Q. Who?

A. Chong Hing Tenn, the man in charge of the finances. He was in charge of finances.

Q. He was supposed to let you know.

A. Let me know when the thing was about to be consummated.

Q. Then for you to put up the money, is that it?

A. That's right.

Q. When was that plan agreed to, about?

A. At the first conference at the house.

Q. At the Tenn house? A. That's right.

Q. Did Chong Hing Tenn ever ask you for that money? A. He never asked me for the money.

Q. Did you at all times have that money available? A. Yes. [172]

(Testimony of Hung Chin Ching.)

Q. Where was that money? How was that to be raised?

A. I was going to mortgage my house on a second mortgage for \$1,000, and borrow \$2,000 from K. C. Wong.

Q. Was K. C. Wong going to let you have it without security? A. Yes.

Q. Without security? A. That's right.

Q. Was that true what Mr. Wong said yesterday, or the other day that he loaned you \$75 to go up to Maui to see Doctor Tong?

A. I borrowed \$75 from him.

Q. Was that without security?

A. No security. He give it to me.

Q. Where were you going to get the loan of \$1,000 on a second mortgage?

A. I was going to get a second mortgage from my brother Hung Wai Ching.

Q. He is a realtor? A. He is a realtor.

Q. Had he agreed to let you have \$1,000 any time? Did he have that money? A. He had.

Q. When did you go to Maui to see Doctor Tong? A. I am pretty sure on the 20th.

Q. How do you happen to fix that date at this time?

A. I just checked my—checked the chart time at the police department, Centio's time and my time.

Mr. Waddoups: I object to this, your Honor, the chart is the best evidence. No showing why it

(Testimony of Hung Chin Ching.)

is not produced. [173] I will object to his giving us something without the privilege of seeing it ourselves and examining it.

The Court: Objection overruled. He is just saying where he got his information. If you want to check the chart you can ask him to produce it.

Q. From the checking of the chart, do you recall October 20?

A. At the time I went up there, either the 20th or the 21st. Either one of those dates.

Q. Do you recall while you were sitting here Doctor Tong testified that you arrived there when the fair was going on?

A. I believe the doctor was mistaken on that, because the fair wasn't on when I was there. That was the first flight of the DC 3. I check on that. They have got the report on that.

Q. Do you remember it as being one of the first flights?

A. The first commercial flight to Maui in the DC 3s for paying passengers. Previous to that they had a trip for editors, reporters, and big shots.

Q. Was that the same day?

A. No. That was a few days ahead.

Q. You say when you arrived there, there was no fair?

A. I don't know that there was a fair.

Q. Was there a fair previously?

A. There might have been. I don't recall.

Q. During this trial period, Mr. Ching, did you notice whether the Green Mill was making money,

(Testimony of Hung Chin Ching.)

or was it such that you—were you people glad that you were going into [174] that business?

A. It was making money. I went out just to—Mr. Chong never let me read the total amount, the take every day. I wanted to take a look at that and read it. He wouldn't let me take a look at it.

Q. How was the business? A. Good.

Q. Well, explain what you mean by good.

A. Average about \$600 a day.

Q. How do you know that, if you didn't look?

A. We talk about it. He tells me how much, but he would not let me look at the end of the day's business.

Q. Were there a lot of people there all the time? A. Lots of people there.

Q. Were you or were you not happy?

A. Very happy.

Q. That you were one of the partners?

A. Yes, I thought I would quit the police department after so many years, and take it easy, put in a little work.

Q. By the way, have you ever been paid a dime for anything?

A. One bottle of whiskey, partially filled, one time. I asked Mr. Chong Hing, how about taking a half empty bottle of Scotch. He said, "Go ahead, take it."

Q. Was that during the trial period?

A. Yes. Then one time, I think it was Christmas, he sent me a bottle of whiskey.

(Testimony of Hung Chin Ching.)

Mr. Lee: Your witness.

Mr. Waddoups: No questions. [175]

(Witness excused.)

Mr. Lee: May we have a short recess at this time?

The Court: Yes.

(Recess.)

Mr. Lee: Your Honor, there is a procedural matter that occurred to us during the recess, that is, in the demurrer files by counsel for the respondent on the question of laches. There is a pleading. I think it was overruled. Now, it is our understanding that that is a question of defense. I would like to know, possibly, whether my understanding is correct as to the law on the procedural matter.

Mr. Waddoups: It seems to me, if your Honor please, it is up to counsel to try his own case.

Mr. Lee: We are prepared to proceed on that. We believe that it should be raised as a matter of defense.

The Court: Well, of course, all the court can go on is that we are in the middle of a case right now, and this court can only decide the case on the evidence that is presented. Now, the thing for you to decide is as to whether or not you decide to rest on the evidence that you produced, or whether you want to go forward. I certainly cannot decide a moot question. There is no question raised here as yet. I notice in one of these de-

murrers there had been set up the defense, or something said about laches. I don't know which demurrer it was in.

Mr. Lee: In practically all the demurrers, your Honor.

The Court: It seems to me that there are two findings in here.

Mr. Lee: There is also this question of getting [176] into the accounting business. As I understand the court's ruling on one of counsel's objections to the matter of the amount of business done during the years 1942, 1943 and 1944, from then on was steady, until the partnership had been approved. Now, I would like to have an opportunity to ask for an accounting, which we have asked for in addition.

The Court: Well, the court is in this position: You gentlemen can proceed with proving your case in any way that you see fit. This court is not going to be put into the position of directing the method of trial. The court is sitting to rule upon what is presented, not to tell counsel what to prove.

Mr. Lee: Mr. Ching, will you take the stand again, please?

HUNG CHIN CHING

the petitioner herein, was recalled, and testified as follows:

Direct Examination

By Mr. Lee:

Q. Mr. Ching, after you left the Green Mill——

(Testimony of Hung Chin Ching.)

Mr. Waddoups: There has been no cross-examination, your Honor.

The Court: Well, as I understand it he is recalling him on direct.

Mr. Waddoups: There has been no cross, you will recall.

Mr. Lee: Yes.

Mr. Waddoups: All right. No objection.

Q. Why didn't you immediately bring an action against the Tenn Brothers after you left the employ? [177]

A. I felt at the time that Doctor Tong would do the right thing by me.

Q. You mean in respect to the Green Mill?

A. I had confidence in him that he would do the right thing by me.

Q. Well, now, when did you see a lawyer about this case?

A. Toward—about the end or the latter part of 1943, I believe I saw you, Mr. Lee.

Q. The records shows that the suit was filed about 1944, the early part of 1944, if I recall.

The Court: According to the petition here, the bill was filed on April 5, 1944.

Q. Why didn't you see an attorney during the years 1942 and 1943?

A. As I said, I had confidence in the doctor, he will do the right thing by me. I waited. Nothing was done. The war came along, and we had extra duties to perform.

(Testimony of Hung Chin Ching.)

Q. As a police officer?

A. As a police officer. Just one of those things that lasted from one day to the other. I just put it off, figuring he would come through and stand by me in that Green Mill business.

Q. Do you recall whether or not during those years we had martial law, also?

A. Yes. We had martial law.

Q. Did that affect your decision in any way about filing suit?

A. At the time I figured I couldn't sue, anyway. [178] We had these military courts, and there was nothing I could do about it. That is my opinion at the time, there is no use suing. The military had control of the courts. It was my understanding at the time that you could not bring any suit against anybody.

Q. Now, you say that you thought Doctor Tong would do what is right by you in the Green Mill?

A. That's right.

Q. So Doctor Tong—did Doctor Tong indicate in any way that he would, during that time?

A. Nothing concrete.

Q. Pardon?

A. Nothing concrete was done by him.

Q. Did he give you that impression that he would? A. Yes.

Mr. Lee: Your witness.

(Testimony of Hung Chin Ching.)

Cross-Examination

By Mr. Waddoups:

Q. After your conference on Maui, how many times did you see Doctor Tong again, between that conference time and the time that you filed the suit? A. How many times? Many times.

Q. Where? A. At his home.

Q. Here? A. In Honolulu.

Q. You called on him personally?

A. Yes. [179]

Q. When did you decide that the military courts were over and that you had a right to come into civil court?

A. I don't recall the year now. I couldn't say that definitely when. I couldn't tell you that.

Q. Was it 1942?

A. Anyway, I decided about the latter part of 1943 to see the counselor.

Q. And you consulted Mr. Lee in the latter part of 1943?

A. Yes. I think it was around about October or November some time—either one of those months.

Q. You filed the suit in April, 1944?

A. I didn't recall the date.

Q. Now, before you filed the suit, did you make any written demand upon Doctor Tong, or any of the partners in the Green Mill?

A. I believe my counsel did. He wrote them a letter.

(Testimony of Hung Chin Ching.)

Q. Do you know whether he did or not?

A. I have a copy home.

Q. When was that?

A. I think about January 6, 1944, if I am not mistaken.

Q. You had seen your attorney in November?

A. Yes.

Q. You have stated that you knew Centio?

A. Yes.

Q. Did he go up to Maui with you?

A. No. We came back together.

Q. He was there when you arrived, is that so?

A. Yes.

Q. Do you know whether he went up for the state fair? [180]

A. He was on his vacation. I don't know whether it was for the fair. I know it was for vacation—annual vacation.

Q. Mr. Ching, do you remember making a statement to Mr. Centio on the boat, coming back, to the effect—to this general effect—"I came to Maui for nothing"?

A. I don't remember that, Mr. Waddoups.

Q. Do you deny making such a statement?

A. I deny it.

Q. You deny it? A. Yes.

Q. Shortly after the war started, you might say a little after the war started, the bars were closed?

A. Yes.

Q. They were closed for a considerable time?

(Testimony of Hung Chin Ching.)

A. Four or five months, I believe.

Q. During that period of time, of necessity all business houses that dealt in liquors lost a very great source of their revenue?

A. Yes—that is, sales.

Q. That fact held true with the Green Mill?

A. Yes.

Q. You were aware of the fact at that time?

A. Yes, I was.

Q. Do you know a fellow by the name of Pai?

A. A very good friend of mine. I know him.
A friend of Doctor Tong and myself.

Q. He conducts a place known as the Mint?

A. Yes. On Beretania Street.

Q. Do you recall any time ever making a statement to Arthur Pai to this effect: [181] “I didn’t put any money in the Green Mill; they are losing money”?

A. I never made such a statement. I told Lum I would like to buy that business, even though it was wartime.

Q. You deny making such a statement?

A. Absolutely, I deny it.

Q. Shortly after the war started?

A. I never made such a statement.

Q. Now, during the time that you were operating up there, working with Mr. Chong, was it your impression that you had an interest in that business?

A. Absolutely.

Q. Did you resign from the police department?

A. The agreement was——

(Testimony of Hung Chin Ching.)

Q. Answer the question.

A. I didn't resign, but——

Q. No. Answer the question.

A. I didn't resign at the time.

Q. All right.

Mr. Lee: If your Honor please, he has a right to explain why.

The Court: Yes.

Mr. Waddoups: You can bring it out on redirect examination, Mr. Lee.

Mr. Lee: Thank you, Mr. Waddoups.

Q. During this time when you say that Mr. Chong would not let you look at the cash register, was that during the period of the trial run—the so-called trial run? [182]

A. It was during the trial run after October 1, when I wanted to take a peek at it, he would make it so that I could not see it.

Q. During the trial run that the money was not considered to be Tenns'——

A. At the time——

Q. Let me finish the question—(Continuing)—and the profits at the time were still going to Lum, pending the clearance of the liquor license?

A. To my understanding it went into the new business.

Q. When you talk about \$600 a day, is that referring to gross or net? A. Gross.

Q. Because you are not familiar with the overhead and costs, you would not know what the net was? A. No.

(Testimony of Hung Chin Ching.)

Q. Is that a fair statement? A. Yes.

Q. So that \$600 figure was the gross figure?

A. Gross sales.

Q. Do you recall any conference with Claude Malini and Mr. Thompson, the gentleman who testified here yesterday? A. I talked with them.

Q. With Mr. Chong Hing Tenn?

A. No. You mean at the commission's office?

Q. Anywhere.

A. No. Not concerning the Green Mill.

Q. You never had a conference with them concerning the Green Mill? [183]

A. I have talked to Mr. Thompson and Mr. Malini outside, not in the presence of this gentleman here.

Q. You did discuss your position in the Green Mill with them?

A. Yes. I told them I got a big double cross.

Q. Did you discuss your position in the Green Mill with them after the license had been changed, or before, or both?

A. One time I went to see Mr. Malini and kind of argued——

Q. Never mind. Just tell me what I am interested in, when you saw them.

A. I don't recall that.

Q. Do you recall whether or not you saw them prior to October 10, 1941?

A. No. I don't remember.

Q. Prior to the time that the change or the application had been granted?

(Testimony of Hung Chin Ching.)

A. No. I wasn't up there at all. That is Mr. Chong Hing's business.

Q. Did you see them down at the place of business, or anywhere? A. No. I don't remember.

Q. Did you follow up at all on the transfer of the liquor license? A. No.

Q. You didn't do anything about it?

A. No.

Q. I call your attention to a letter written to you and signed "Bear," which is identified as Petitioner's Exhibit [184] A, and I will call your attention particularly to a part of the second paragraph, where it says, "I have 15 shares and you have three, that is if you can get the dong by then." What is meant by that expression?

A. He meant by getting the money.

Q. After you received this letter, did you produce any money?

A. I was waiting for Mr. Chong Hing to ask for that money.

Q. You didn't go and say, "When do you want it," or anything, you waited for them to call you?

A. I was waiting for the consummation of the deal.

Q. At the time when you received this letter, had you completed your loan so that you could get the necessary \$3,000?

A. I had already made all arrangements, merely signing the check.

Q. Your financial situation, personally, so far as ready cash was concerned at the time, was fairly

(Testimony of Hung Chin Ching.)

precarious? A. Well, I had very little cash.

Q. As a matter of fact, you testified here that you never got anything from the Green Mill, except a little bottle of whiskey? A. That's right.

Q. Do you recall giving them a \$50 check that bounced? A. That's right.

Q. They didn't do anything about it?

A. No. That was Long John. Nothing to do with the Green Mill.

Q. That was about this same time?

A. No. It was prior to that. It was in September. [185]

Q. Well, I mean, it was in general about the time?

A. It was long after when he told me about it. I had an account down at the Liberty Bank.

Q. Now, do you recall the date that you went to Mr. Fong's office and made a telephone call to Maui?

A. That was about the 20th or the 21st.

Q. Had you ever been to Mr. Fong's office before that? A. Never did.

Q. Had you ever talked to Mr. Fong about this deal? A. No, sir.

Q. You knew, during the process, that Mr. Fong was handling all the matters pertaining to the consummation of this sale of the Green Mill?

A. That's right.

Q. Did you ever ask to see any papers that were being drawn in connection with it of Mr. Fong?

A. I never did.

(Testimony of Hung Chin Ching.)

Q. Did Mr. Fong ever show you any papers being drawn, or that had been drawn in connection with it? A. No. I never asked him.

Q. On this occasion that you testified about, where Mr. Fong, according to your testimony, said, "You are out," or words to that effect, did you ask at that time to see the partnership papers?

A. I didn't ask. I was so upset, I immediately got on the 'phone and got hold of Doctor Tong.

Q. After you talked to Doctor Tong and Mr. Fong talked to Doctor Fong—he talked, did he not, on that same 'phone [186] call?

A. I don't remember. I think I did all the talking. I used the 'phone myself.

Q. Mr. Ching, what were the hours down there during this period when you were there?

A. You mean at the Green Mill? A little after 4:00 o'clock to 11:00.

Q. Did you have a regular beat?

A. A regular beat?

Q. I mean an unchangeable one?

A. I was in the office. I was dispatch sergeant.

Q. I see. So you had regular hours down there?

A. Yes.

Q. And those hours were from what, 8:00 to 4:00?

A. 8:00 to 4:00. We changed every three months at the time.

Q. When you completed your work there you would change into civilian clothes, would you?

(Testimony of Hung Chin Ching.)

A. That's right.

Q. And come up to the Green Mill?

A. That's right.

Q. Did you have your meals there?

A. No. Very seldom I had eaten there.

Q. How late would you work there?

A. 11:30 to 12:00 o'clock.

Q. During the period when the Green Mill bar was closed, did you have occasion to go up there at all?

A. After the bar closed? [187]

Q. During the period right after the war, when all the bars were closed up?

A. No. I never been there. I passed by there. It was always closed.

Q. During that period, just after the war started, during the time that the bars were closed, did you make any demands upon any of the three partners of the Green Mill?

A. No. I didn't make any demands.

Q. When did you make your first demand upon them?

A. When I saw my counsel, Mr. Lee.

Q. So that the first demand that was made upon them was, to the best of your recollection, January 6, or thereabouts, 1944?

A. Yes. That's correct.

Mr. Waddoups: I think that's all at this time, if your Honor please.

The Court: Redirect examination?

(Testimony of Hung Chin Ching.)

Mr. Lee: No questions.

(Witness excused.)

Mr. Lee: If your Honor please, yesterday I asked for some receipts—bank statements.

Mr. Waddoups: Just a minute. Do you have any objection to my asking him a couple more questions?

Mr. Lee: No.

HUNG CHIN CHING

the petitioner, was recalled and testified as follows:

Cross-Examination

By Mr. Waddoups:

Q. Mr. Ching, as a part of this overall agreement that [188] you testified that you were to be a part of, was there a lease involved?

A. You mean for the premises?

Q. Yes.

A. I think that the place was leased.

Q. I mean was there a lease—was the deal—whoever was to buy it from Lum, one that contemplated getting an assignment of a lease?

A. I think there was a lease. I understand that there was a lease. Lum leased from somebody else, and he was just to lease it to us.

Q. Was it your understanding that you were to be included as one of the assignees in the assignment of the lease? A. That was the agreement.

Q. Did you have any written agreement with

(Testimony of Hung Chin Ching.)

Lum, or with the respondents, relative to the acquiring of this lease? A. No, sir.

Mr. Waddoups: That's all.

Mr. Lee: That's all. No questions.

(Witness excused.)

WALLACE AOKI

called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lee:

Q. What is your name, please?

A. Wallace Aoki.

Q. What is your occupation?

A. Cashier or bookkeeper at the Hawaii Meat Market. [189]

Q. Do you know the Tenn brothers?

A. Yes. I do.

Q. Did you ever keep their books at the Green Mill? A. Yes, I did.

Q. When did you start keeping their books at the Green Mill?

A. Actually started keeping them, I would say, about June or July, 1942.

Q. 1942? A. Yes.

Mr. Waddoups: Well, we are willing to stipulate with counsel that it would be more convenient to the court, and better procedure for the mechanics of the accounting, that evidence concerning the

(Testimony of Wallace Aoki.)

actual accounts be continued until such time as the court has determined the preliminary question as to whether or not an accounting should be had. I think that is proper. There would be no point in putting in evidence, wasting the court's time, unless the court first determined that the relief prayed for should be had. I think that is the usual procedure.

The Court: The question on the evidence on the accounting need not be put in at this time.

Mr. Waddoups: In the event that the accounting is ordered, then it would be up to the respondents to make an accounting.

Mr. Lee: If the court ordered the relief prayed for, it would be the respondents' duty to do that.

The Court: This other situation is on [190] another phase, but nothing to do with the accounting?

Mr. Lee: No. That's right. I brought it up at the time——

The Court: All right. This man may be withdrawn without prejudice to recalling him, if necessary, on the phase of the accounting.

Mr. Lee: Thank you, Mr. Aoki.

(Witness excused.)

Mr. Lee: We rest, your Honor.

Mr. Waddoups: We would ask for a brief recess.

(Recess.)

Mr. Waddoups: If the court please, we move to dismiss the amended bill, and any bills which were

incorporated by reference in it, and that the respondents may go hence with their costs.

This motion is based on several grounds. The first is that there has not been given to the court that type of action which is contemplated in an equity court, or in equity jurisprudence. We maintain that the evidence has disclosed a situation which required the petitioner to pursue any remedy, if he had one, in a court of law, and not in a court of equity. What has been proven to the court is not a partnership, nor a joint venture, but at best, taking the evidence in its most favorable light to the petitioner, there has been proven an agreement to enter into a joint venture which agreement was never consummated. The evidence is that the parties to this proceeding met, that there was a discussion, that Mr. Ching was to have \$3,000 in an investment [192] in what turned out to be a \$35,000 investment, that being the purchase price of \$25,000, plus the inventory of \$10,045. He was to handle the personnel, and Mr. Chong Hing was to handle the financial matters in connection with the Green Mill. A very significant factor in determining whether there was actually a joint venture formed, in which the petitioner acquired an interest, is two-fold. The court will recall that in the report of the liquor commission, or the report submitted to the liquor commission of Malini and Thompson, they stated to the liquor commission that Mr. Tenn was going to have the license, and that he would have as his assistant, Mr. Ching, the petitioner. That is one element to consider. They got that information some place.

That was the impression that they got then on the ground. There is a further and more important consideration, it seems to me in determining whether or not Ching honestly, in his heart at the time, felt that he had actually entered into a joint venture with these respondents, and that is that he did not resign his position at the police department. Had he for a minute felt as he would lead this court to believe when he went down in the early stages of this affair, that he actually was a partner, or that he actually had a share, certainly, if he is an honorable person that would seek the aid of a court of equity, he would then have resigned. The obvious, perfectly answer is that no agreement was ever consummated. Add to this, your Honor, the very significant fact that he never at any time produced one cent toward the purchase of this business. He never at any time inquired as to "when shall I put up the money?" Right in the face of this [193] letter which he received from Doctor Tong, with whom he had had his principal dealings, saying he was to have three shares if he got the "dong" by that time.

The Court: The court understands that they had no dong. It means money from another source.

Mr. Waddoups: Yes, that's right. There we have at best, if your Honor please, a verbal agreement, under the terms of which these people were looking to an ultimate agreement which was never consummated. Now, if there was a breach of that verbal contract, his action at that time was an action at law for damages for breach of contract.

We have the further fact, if your Honor please, that this petitioner has not come before this court, as a chancellor required, with clean hands, because he is unquestionably, in our opinion, guilty of laches in the premises. We have a situation here where he says that he thought that he had an interest in the business. The war comes along. He has done nothing about it. He says he thought Doctor Tong would take care of him. Doctor Tong's testimony, put on by the petitioner himself—although it was granted, it was as an adverse witness—is that he advised Ching before the execution of their partnership agreement that he was out, that he had not produced the money, and that that was the end of it. Ching knew that they were in business there. He was around from time to time. He knew that they were in business from October, 1941, all the way into April, 1944. Now, the crux of the matter was very properly stated by Judge Cristy in overruling one of the demurrers—I mean in sustaining one of the demurrers on the ground of laches. Judge Cristy, and I quote from [194] the record of this court—

Mr. Lee: If your Honor please, I object to the reading of the statement—it is part of the record here—but in his argument on this matter. The thing that is before the court is the last bill of complaint—

Mr. Waddoups: Well, it is before the court. I want to read it. It is part of my argument.

The Court: Here is the situation. It is part of the record of this case. Of course, the court can take judicial notice of the record of its own proceed-

ings. What Judge Cristy says is not binding upon this court. I am thinking differently from Judge Cristy.

(Argument by counsel.)

(Response by petitioner's counsel.)

The Court: This being a motion to dismiss, which is in the nature of a claim that there is no proof to substantiate the allegations of the petitioner, and therefore the petitioner is not entitled to any relief at this time, the court in this situation, the same as in the demurrer, has to look on the evidence in its best light. With that end in view, this court at this time will overrule the motion to dismiss.

Mr. Lee: Yes.

Mr. Waddoups: Very well, your Honor. I assume that we will resume tomorrow?

The Court: The court will reconvene at 8:45 tomorrow morning.

(Whereupon an adjournment was taken in this case to Thursday, June 24, 1948, at 8:45 o'clock a.m.) [195]

June 24, 1948, 8:45 o'Clock A.M. Session

Mr. Lee: Ready, your Honor.

Mr. Waddoups: Ready to proceed, your Honor. I will call Mr. Fong.

HIRAM FONG

called as a witness on behalf of the respondents,
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Waddoups:

Q. State your name, please.

A. Hiram L. Fong, attorney licensed to practice
in all the courts of the Territory of Hawaii.

Q. Mr. Fong, do you know Doctor Tong?

A. I do.

Q. Do you know Chong Hing Tenn?

A. I do.

Q. Do you know Kui Hing Tenn?

A. I do.

Q. Do you know Mr. Ching, Sergeant Ching, who
sits with his counsel at the counsel table?

A. Yes.

Q. Do you you know Elsie Lum?

A. Yes. I know her.

Q. During October, 1941, were you acting as her
attorney? A. I was.

Q. In that connection did you have occasion to
do any legal work in connection with the premises
known as the Green Mill? A. Yes. [196]

Q. I will call your attention to Respondent's
Exhibit I, and ask you to examine that document.

A. This document is an agreement of copartner-
ship, dated October 14, 1941, between Fook Hing
Tong, Chong Hing Tenn, and Kui Hing Tenn.

Q. Was that prepared in your office?

(Testimony of Hiram Fong.)

A. Prepared in our office, notarized by my notary, Eleanor Young Lum.

Q. Mr. Fong, do you recall the circumstances concerning the preparation by you of that document?

A. Yes, I do. I remember the principal points, but not the details.

Q. Prior to the execution of that document, did Sergeant Ching come into the office?

A. Mr. Ching had been in my office two or three times, maybe more.

Q. Prior to the preparation of that document?

A. Yes.

Q. On one occasion did he make a 'phone call to the Island of Maui?

A. He did, in my office.

Q. Will you tell the court the circumstances surrounding that 'phone call? Let me put it this way: Who did he call, do you know?

A. He called Doctor Tong who was then in Maui, as captain in the medical corps, National Guard.

Q. Do you recall anything that was said by Ching at the time on the 'phone?

A. I couldn't swear, but I believe it was a question as to [197] whether Mr. Ching was going to be a partner, but I couldn't swear to that. It is so long ago, seven years now.

Q. Well, did you on that occasion, at that same time, after Mr. Ching had talked to Doctor Tong, did you talk to the doctor—Doctor Tong?

A. After Mr. Ching talked to Doctor Tong, I did.

(Testimony of Hiram Fong.)

Q. Do you recall what Doctor Tong told you or Mr. Ching at the time?

A. I think it was at the time a question——

Mr. Lee: I object to anything about what Doctor Tong told Mr. Fong, as hearsay.

The Court: Yes, it would be hearsay. If he related the conversation to your client, it would be a different thing.

Mr. Waddoups: Pardon?

The Court: If he related the conversation to the client.

A. Before I answer the question, also, I would like to inject this: I don't know whether it is ethical for me, really, to take the stand, being the attorney in this matter at the time, and I would like the court to rule on that.

The Court: Here is the situation, Mr. Fong, with reference to this, the respondents, the Tenn Brothers, for whom you drafted the partnership, they have produced you as a witness, so that you are not, as I understand the rule, under any——

Mr. Waddoups: They have waived their attorney-client relationship. [198]

The Court: If they produced you as a witness, the ruling against an attorney revealing a conversation between he and his client does not exist in this particular situation.

Mr. Lee: May I ask a question on that phase of it before proceeding on this testimony?

Mr. Waddoups: No objection.

(Testimony of Hiram Fong.)

Q. (By Mr. Lee): Mr. Fong, at the time were you representing Mr. and Mrs. Lum?

A. Primarily I was attorney for Mr. and Mrs. Lum, trying to sell the Green Mill interest to the Tenns and to Mr. Ching.

Q. It so happened that with the understanding of all parties concerned, they wanted you to also follow the thing through to see that the sale was consummated between the parties?

A. That was the understanding.

Q. There was an understanding that you were to draw up the partnership papers for the parties?

A. Yes.

Q. You acted for Mr. Ching?

A. I don't know whether I acted for Mr. Ching or I acted for the purchasers. The question as to who was the purchaser came up naturally afterwards. To ascertain as to who was the purchaser I have to ask, being an attorney, you have to ask who were the purchasers.

Q. That's right. There was one question, whether or not you understand the purchasers were the Tenn brothers and Mr. Ching, or just the Tenn brothers—— [199]

A. In the family?

Q. In the family, that's what I mean.

A. In the family. Ching came to my office several times, together with the Tenn brothers. But later it developed only the Tenn brothers bought it. The letter that went to the liquor commission, which I wrote—that also I can't recall whether or not I

(Testimony of Hiram Fong.)

stated to the liquor commission that the recall whether or not I stated to the liquor commission that the Tenn brothers were buying it. I believe if you will look at the records, that you will find that's so.

Q. (By Mr. Waddoups): You say it was your impression that Ching was to be a purchaser?

A. That was my impression, that he was supposed to be with them.

Q. Did you receive any instructions concerning the preparation of these documents later?

A. Yes, I did receive from Doctor Tong—from Mr. Tenn.

Q. What were your instructions so far as they related to Mr. Ching?

A. The instructions were that the purchasers would be Kui Hing Tenn, Chong Hing Tenn, and Fook Hing Tong, as Mr. Ching was not able to supply any money at all.

Mr. Waddoups: Your witness.

Mr. Lee: I move to have that last statement stricken?

The Court: That is, his instructions?

Mr. Lee: It is not instruction, so far as the statement about not being able to raise money. That is not instruction. [200]

Mr. Waddoups: If your Honor please, counsel opened up this question, and he argued it at great length yesterday, the fact he was telling Mr. Fong what to do.

Mr. Lee: Well, certainly, I am glad Mr. Fong

(Testimony of Hiram Fong.)

is telling the court who told what, but any statement made by any of these parties concerning Ching's inability, or whatever you may call it, to put up the money, that, it seems to me is irrelevant.

The Court: No. It is not irrelevant by any means. The only question is as to whether it is a self-serving declaration on the part of Tenn brothers.

Mr. Lee: It certainly is, your Honor.

The Court: It is certainly relevant and material to the issues. There is no question about that.

Mr. Waddoups: It is in the same category as the testimony given by Mr. Lum as to what was said by the parties. This is all part and parcel of the proposed deal. It seems to me that any evidence that the court can get——

The Court: The court will admit it, subject to a motion to strike at a later time.

Q. (By Mr. Lee): Did you have a file, Mr. Fong——

The Court: Wait a minute, he is not through with his examination.

Mr. Lee: Oh, I thought he was.

Q. (By Mr. Waddoups): Do you recall, Mr. Fong, whether this conversation that you had and Mr. Ching had with Doctor Tong on Maui, was before or after the partnership agreement had been executed? [201]

A. It was before, and I talked to Doctor Tong on the 'phone at the time and asked him who would be partners.

(Testimony of Hiram Fong.)

Q. As a result of that conversation, you prepared the partnership papers?

A. No. I wasn't sure yet. After that conversation I talked to Mr. Tenn, Chong Hing Tenn, and I asked him if Doctor Tong was correct, that the partners would be so and so.

Q. Then, as a result of your conversation with these respondents, you prepared a document, the document which you are now holding in your hand, Exhibit A?

A. Yes.

Mr. Waddoups: Your witness.

Cross-Examination

By Mr. Lee:

Q. You first came into the picture, as I understand it as attorney for the proprietors at the time, Mr. and Mrs. Lum Kam Hoo?

A. That's correct.

Q. It was some time in September, wasn't it, 1941, that you got word from the proprietors that they were going to sell the Green Mill to Mr. Ching and the Tenn brothers?

A. I can't recall the date.

Q. Well, I noticed Mr. Waddoups asked you the month of October, 1941, concerning the partnership?

A. The date of the partnership?

Q. The date in the partnership, is that correct?

A. Yes.

Q. In other words, perhaps I could try to refresh your [202] recollection this way: The date of the partnership was inserted in handwriting?

(Testimony of Hiram Fong.)

A. That's true.

Q. It wasn't typewritten, the date on the partnership? A. No.

Q. Now, can you remember, Mr. Fong, how many weeks, shall we say, before the document of partnership was actually executed, to wit, October 14, by the two Tenns, did you have knowledge of the proposed sale of the Green Mill by Mr. Lum?

A. I couldn't actually recall, I would say a matter of a month, probably.

Q. About a month?

A. Three or four weeks.

Q. Three or four weeks, approximately?

A. Yes.

Q. Who informed you that there was going to be this proposed sale?

A. I couldn't remember how the thing came up. I know Mr. Ching was in my office. Mr. Tenn was in my office.

Q. In the beginning——

A. He came to me and talked to me about. I couldn't remember. Probably Mr. Lum talked to me. Mr. Lum was in the process, trying to sell this place.

Q. He was a sick man at the time?

A. He was a sick man. He even wanted me to take it over one time.

Q. Maybe you would be better off to take it?

A. Yes. [203]

Q. You have a folder? A. Yes.

Q. Haven't you, on this Green Mill thing?

(Testimony of Hiram Fong.)

A. Yes.

Q. And this folder was in Ching's name, or Chong Hing Tenn?

A. No. That folder was in the name of Green Mill, and it was kept in my personal drawer, because of the personal relationship I had with Mr. Lum. Those papers were really belonging to Mr. Lum.

Q. I know that you acted for him, not only as attorney, adviser and everything, so that he had implicit confidence in you, I understand that.

A. Yes.

Q. You drew up the bill of sale, did you not?

A. I did.

Q. You received the moneys, the down payment for the proposed sale?

A. I couldn't recall. I can't recall how the money was passed.

Q. Do you recall whether or not you had books which would show that you received the money for the purchase of the Green Mill, if the money was paid over to you?

A. No. I don't believe it would pass through my books, because if it was, being such a big amount—naturally, it would come into the office in a check, I would probably pass it over.

Q. Pass it over to your clients, the Lums?

A. Yes. [204]

Q. Now, do you recall whether or not the check was paid to you for the purchase of this property?

A. I don't remember, but the usual practice in

(Testimony of Hiram Fong.)

my office is always have the check made payable to the seller; never to me.

Q. How did they give you that check, possession of the check?

A. I don't know, as I said, I don't know whether it was money or cash or a check, how it was passed. That I can't recall.

Q. Do you recall what the purchase price of the deal was?

A. I can't even recall that now.

Q. There is no dispute about the amount, so I may inform you to refresh your recollection it was \$25,000, plus the inventory, which was about \$10,000. Do you recall whether a check for \$25,000 was turned over to you for Mr. Lum?

A. That I don't recall.

Q. Do you recall whether there was a check of \$15,000 first paid through your office?

A. I don't recall that.

Q. You don't recall that. I will show you Petitioner's Exhibit J, and Petitioner's Exhibit C, both of which purport to be a bill of sale for the Green Mill.

The Court: Exhibit J is a copy of what he filed with the liquor commission.

Mr. Lee: That's correct, your Honor.

Q. Will you take a look at these documents?

A. Yes.

Q. They are exactly the same language, aren't they, I mean so far as you can see?

The Court: By a cursory perusal?

(Testimony of Hiram Fong.)

A. Yes. [205]

Q. Did you notice the difference in the date of the indenture, the date of the heading?

A. You see, the policy of the liquor commission is this: That before they will approve of a transfer, they want you to make a bill of sale to keep, we sent them a copy of a bill of sale. There may be a discrepancy of ten days from the time it was delivered to the liquor commission and the time of the actual consummation. That is the only way I can explain it.

Q. In other words, so far as this copy which was filed with the liquor commission, Petitioner's Exhibit J, that was dated October 10, 1941?

A. Yes.

Q. Wouldn't you say, so far as the seller and the purchasers were concerned, that the deal had been consummated prior to October 10, 1941?

A. I would say with the copy of the bill of sale and the letter to the liquor commission, that must have been a meeting of the minds, otherwise I would not have sent that to the liquor commission.

Q. Because it was an executed copy, wasn't it, by Mrs. Lum, your client, that you filed with the liquor commission? They require a duplicate original, don't they?

A. No. So far as the liquor commission is concerned, they want a copy of it, not an executed copy. Now, it seemed that was executed, wasn't it?

Q. It was executed, Mr. Fong. I am trying to inform you that this was an executed copy, so that

(Testimony of Hiram Fong.)

Mrs. Lum had already given a bill of sale to the Tenn brothers on October 10, 1941, isn't that [206] right?

A. Whether there had been delivery of the bill of sale or not, I don't know, but according to the document, it seemed that she did sign it. All I can say is that Mr. Lum had implicit faith in me, and would execute all papers and leave them with me.

Q. In other words, so far as the seller was concerned, he left all the legal and financial details practically in your hands? A. Yes.

Q. He had such confidence in you?

A. Yes.

Q. Wasn't that the understanding of all the parties concerned, not only Mr. and Mrs. Lum, but the Tenn brothers and Mr. Ching, that you would handle the legal papers? A. That's correct.

Q. After the few original conversations that you had with Mr. Ching, and several of the Tenn brothers, you received thereafter most of your instructions direct from Doctor Tong and Chong Hing Tenn?

A. I think, so far as Doctor Tong was concerned, it would be a telephone conversation. That probably was the only one. Or there might have been a letter from him. I don't recall. It was from Mr. Tenn mostly.

Q. Chong Hing Tenn, he was the one that gave you most of the instructions, is that correct?

A. Yes.

Q. Do you recall on October 20, about that time, 1941, there was this 'phone call made by Mr. Hung

(Testimony of Hiram Fong.)

Chin Ching to Doctor Tong—I don't know what the date was—some time in October, wasn't it? [207]

A. I don't know.

Q. Well, then, you really don't know whether it was before or after the completion of all the legal documents?

A. It must have been prior, because I didn't know then as to who the partners were.

Q. Don't you recall that conversation with Mr. Ching, when he asked you, "How are the partnership papers?" and you said, "You are out; you are excluded from the partnership papers," don't you recall that, or words to that effect? A. No.

Q. You don't? A. No.

Q. Now, this conversation at your office, where you testified that it must have been, by your present recollection now, it must have been before the final papers of partnership were drawn, do you recall that it was a surprise to Mr. Ching that he was not included as one of the partners?

A. No. I think at the time of the conversation between Fook Hing Tong and myself there seemed to have been an understanding at the time.

The Court: An understanding of what?

A. Of whether he was in or out, because he called Mr. Tong at the time from my office, and Mr. Tong talked with me. Now, I don't remember whether I told Mr. Ching what Mr. Tong told me.

Q. Do you remember that Mr. Ching decided to go to Maui immediately?

(Testimony of Hiram Fong.)

A. I think he did. I think he did following what Mr. Tong told me. I think he went to Maui, but I couldn't swear to it.

Q. It was your understanding at the time—this is clear, [208] Mr. Fong, in your mind—that at the time when Mr. Lum, your client, informed you to prepare all the papers, etc., you had discussions with Mr. Ching and Mr. Tenn that the prospective purchasers were the Tenn brothers and Mr. Ching?

A. That was the understanding originally, that it was the Tenn brothers and Mr. Ching who were going to be involved as purchasers of this tavern.

Q. In fact, it was your understanding at the time that Mr. Ching was one of the principal cogs in the wheel?

A. Well, he came to my place three or four times and talked about it. I think that he also talked about an inventory, and things like that.

Q. All the details that went with the purchase of the business?

A. He seemed to know what was going on.

Q. Just one more thing. I will show you what purports to be a statement of the copartnership, filed in the treasurer's office October 20, 1941.

The Court: Does that have an exhibit number?

Mr. Lee: Petitioner's Exhibit D.

A. It seems to have been prepared in my office, because my notary public notarized it.

Q. You notice that it certifies that the partnership had been formed as of October 1, 1941, is that correct?

(Testimony of Hiram Fong.)

A. Yes, that's so, according to this.

Q. Therefore, does it refresh your recollection that the partnership had been formed on October 1, 1941?

A. According to this, it must have been formed on the 1st [209] day of October.

Q. By the way, of course that speaks for itself, that the partners were Fook Hing Tong, Chong Hing Tenn and Kui Hing Tenn? A. Yes.

Q. And Mr. Ching was not included?

A. No.

Q. Mr. Fong, I will show you also Petitioner's Exhibit B, which is a communication addressed to you by the liquor commission in response to a letter by you, on behalf of Mrs. Elsie Lum, asking for a transfer of liquor license—your letter dated October 6, 1941. Do you recall that you received this letter from the liquor commission? A. Yes.

Q. Do you notice, also, that in this letter, it states in your application to the liquor commission to have it transferred to Fook Hing Tong, Chong Hing Tenn and Kui Hing Tenn? Do you notice that?

A. Yes.

Q. This was true, by your present recollection, that you must have received instructions prior to October 6, 1941, of who the prospective purchasers were going to be?

A. It must have been, because I must have wrote to them on the 6th day of October.

Q. Just like the certificate of partnership, when you stated it was October 1? A. Yes.

(Testimony of Hiram Fong.)

Q. These instructions that you had of who the partners were came from Chong Hing Tenn primarily, is that right? [210] A. Yes.

Mr. Lee: No further questions.

Mr. Waddoups: Thank you, Mr. Fong, that's all.

(Witness excused.)

DAVID P. SOARES

called as a witness on behalf of the respondents, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Waddoups:

Q. What is your name, please?

A. David P. Soares.

Q. Mr. Soares, at my request were you asked to serve a subpoena—I withdraw that—I will show you a subpoena bearing Equity Number 4416, being the number of the case now on trial. Do you recognize that document? A. Yes. I do.

Q. At my request, were you asked to serve that document? A. Yes.

Q. I call your attention to the return on the back of the page of this document, on which you say, "Unserved on Arthur Pai, gone to Maui, June 22, 1948."

Where did you attempt to serve Mr. Pai?

A. At his house, and at his place of business. I went out there to Nuuanu street, and they said Pai was not in. I said, "What time is he coming in?"

(Testimony of David P. Soares.)

They didn't know. I went to his home address, they said, "Pai not in." I went back again last night, about 8:00 or 8:30, and asked for Mr. Pai. They said he wasn't in. They asked, "Who is it?" I didn't tell [211] them who I was. I said, "Who are you, Mrs. Pai?" She said, "No. I am the daughter. My father went to Maui yesterday, on the 22nd."

Q. Did she say when he was coming back?

A. She didn't know. I said, "Where is your mother?" She said, "She is out on a party." She didn't know what time she is coming back.

Mr. Waddoups: Thank you, Mr. Soares.

(Witness excused.)

FOOK HING TONG

a respondent herein, was recalled, and testified as follows:

The Court: The witness has already been sworn.

Direct Examination

By Mr. Waddoups:

Q. You are Doctor Fook Hing Tong?

A. Yes.

Q. You are the same witness who testified earlier in this proceeding? A. Yes.

Q. Now, Doctor Tong, how old are you?

A. I am 44.

Q. What has been your education?

A. Well, I have a medical degree. I spent four

(Testimony of Fook Hing Tong.)

years at the Territorial Hospital after my graduation and internship, and came out to practice medicine. Then I had a job at the City and County, in addition to my practice. In 1940, I volunteered for the National Guard, for the defense. During that period the blitz came, so I was held up six years. I went in for one [212] year, and I got five years. I am practicing now on my own.

Q. Are you practicing in Honolulu?

A. Yes.

Q. Are you associated with anyone?

A. Not associated with anyone.

Q. You have your own private practice?

A. I have my own private practice.

Q. You are a duly licensed physician and surgeon?

A. Yes. I am also at the City and County Hospital unit, as assistant to Doctor Mossman.

Q. Now, Doctor Tong, there has been testimony in this case concerning really the first meeting, or the gathering of the clan—that meeting that they talked about which was held at your house, at which your father was present, you, and the other respondents, and your brother—another brother.

A. Yes.

Q. Now, Doctor, what arrangements were made at that meeting between you with respect to the relationship which Mr. Ching bore to the partnership or the prospective partnership, if any?

A. At the time we were all there, the agreement was to raise the money. We were planning, so far

(Testimony of Fook Hing Tong.)

as I was concerned, the plan of that was secondary to the primary purpose of getting the property. It takes money to do business. So I asked who could finance it. I asked Mr. Ching, as in the previous testimony, what he wanted, and he said that he wanted \$2,000, or something to the effect of \$3,000.

Q. From whom was he to get those three shares? From whose [213] portion of the prospective partners?

Mr. Lee: I object to that question. It is direct.

The Court: Overruled. It doesn't suggest the answer, when you ask him how was he to get it.

A. Well, it came later on. We had to put up the money. There was a lot of competitors trying to get it. Mr. Ching didn't have it. He asked me to finance him. I had my ten, I told him I would take care of him provided he put up the money.

Q. From your ten shares? Did he ever put up the money?

A. Well, there was four or five or six occasions I asked him, and he never put up any—not a red cent.

Q. Doctor, I call your attention to Petitioner's Exhibit A, and A-1, the first being a letter, dated October 6, written to Mr. Ching, and Exhibit A-1, being a copy of a letter which was addressed to—I think the testimony shows—your brother, Chong Hing Tenn. Tell the court what impelled you to write this letter to Mr. Ching?

A. Well, I had received a letter from him, concerning our business going on.

(Testimony of Fook Hing Tong.)

Q. Do you have that letter now?

A. No. In the rush of the blitz and everything, it got mixed up and burned.

Q. What was the general purport of that? Who was the letter written to, if anyone?

A. The letter was written to Chong Hing Tenn, about his conduct, cold, pulling stone faces, driving business away with that kind of mug he has, not getting along with the employees. [214] We had a gold mine. There was a gold mine there. He would sure ruin the business.

Q. After you had written the letter which you have in your hand, Petitioner's Exhibit A, did you hear any other reports about the business? Just answer that yes or no. A. Yes.

Q. As a result of hearing these reports, did you do anything? A. Yes. I wrote a letter.

Q. To whom did you write a letter?

A. Mr. Ching. I told him to vacate the premises.

Q. By that, what premises did you mean?

A. I mean the Green Mill there.

Q. What happened to that letter, if anything?

A. He returned that letter to me, he said he is not guilty.

Q. Do you have that letter?

A. Well, that went all through all the process in the blitz, I couldn't keep anything.

Q. You do not have possession of that document?

A. No.

Q. Now, was that letter addressed to him prior to or after his trip to Maui?

(Testimony of Fook Hing Tong.)

A. It was prior to his trip to Maui.

Q. Was that letter addressed to him prior or after your executed partnership agreement?

A. That letter was prior to the execution of the partnership agreement.

Q. Did you give any reasons in your letter to Ching, why you wanted Ching——

A. Yes. [215]

Q. What was the substance of those reasons?

A. One of them that he didn't have any money in the business, another thing, his conduct, his character, so far as business is concerned, it wasn't businesslike. That he had broken faith with me. I had all confidence and faith in him, and he had betrayed my confidence. After writing this letter, I then backed him up to the limit, but I got a report from several sources——

Q. Never mind what the reports were, that is hearsay. Your testimony is that he returned that letter to you with the notation in his own handwriting to the effect "not guilty"?

A. I remember now. It was on the other side. The letter was a page and a half in my handwriting. He wrote on the back of it, "Not guilty."

Mr. Waddoups: Your witness.

Cross-Examination

By Mr. Lee:

Q. Now, Doctor Tong, going back to your testimony relating to what took place at your father's home——wasn't it? A. Yes.

(Testimony of Fook Hing Tong.)

Q. Not your home? A. No.

Q. Now, you stated, so far as you were concerned, raising the money was the thing you were principally concerned with, is that right, at that conference?

A. Yes. I was principally concerned with it.

Q. The matter of the purchase of the business, that is incidental to the whole purpose, or am I correct? [216]

A. If you haven't got the money, you can't buy anything.

Q. Is that what you want the court to believe, that the purchase of the business was incidental?

A. Yes, I don't want the court to believe, but it is my own, what do you call it, impression. What's the use of putting the cart before the horse? It takes money. You have got to have money to conduct business these days.

Q. As a matter of fact, you people were pretty hot about buying that business, so hot that you folks immediately called Mr. Lum, and went to his home that very night? A. Yes.

Q. Hot after the purchase?

A. Mr. Ching came over to the house, we talked it over.

The Court: I take it by "hot" you mean quite anxious. A. No.

Mr. Lee: We are using the words "dong"—what I meant is anxious.

The Court: You are using the language of realtors when they use "red hot prospect."

(Testimony of Fook Hing Tong.)

A. No. I don't think I was too anxious.

Q. You were not? A. No.

Q. As a matter of fact, Ching did call up Lum that very night? A. Yes.

Q. You are willing to admit that?

A. I admit what went on, to the best of my memory.

Q. Then answer this question: Did all of you get into the [217] car of Mr. Ching and drive immediately to Mr. Lum's home? A. Yes.

Q. Before you drove over to Mr. Lum's home, wasn't it agreed that Mr. Ching was to put in \$3,000?

A. Not before. We didn't know whether the place was to be purchased or not.

Q. Well, now, you just mentioned yourself, your brother Chong Hing Tenn admitted finally that Mr. Ching was to put in \$3,000?

A. I spoke, in my former testimony here, after we found out it was for sale.

Q. I am talking about the conference held at your father's home.

A. That's what I meant. That's the first time I ever heard of that place being for sale. That is the first time we ever got together.

Q. You mean to say, then—let me refresh your recollection, do you recall whether or not you and Mr. Ching had seen Mr. Lum and had discussed the possible purchase of the Green Mill before the conference at the home?

(Testimony of Fook Hing Tong.)

A. I don't recall, because we went to a lot of places, socially, and otherwise.

Q. You mean socially to the ones down on College Walk, Cafe Venice?

A. We went to Smiles.

Q. Did you go to the Cafe Venice?

A. I remember being there once.

Q. Do you recall going to the Riverside Grille, where K. C. Wong operates? [218]

A. I remember one afternoon there.

Q. You remember that, don't you?

A. Yes.

Q. You also remember dropping in at the Green Mill?

A. That was kind of hazy, I don't recall that. I have been there several times myself with other people.

Q. You recall you and Mr. Ching dropping in at the Green Mill, besides the Riverside Grille?

A. I may have. I don't really remember.

Q. You don't deny it? A. I don't deny it.

Q. Do you deny Mr. Ching spoke to Mr. Lum about the purchase of his business?

A. I think that at the time—my impression is we asked a lot of people if the place was for sale, maybe one of these was Mr. Lum. I don't know.

Q. You recall that.

A. I thought he was kidding Mr. Lum.

Q. You recall that Mr. Lum mentioned some figure, something like \$30,000, do you recall?

A. No. I don't.

(Testimony of Fook Hing Tong.)

Q. And that meeting with Mr. Lum, and at the Riverside Grille, all that took place before the conference at the Tenn home, isn't that right?

A. Oh, yes.

Q. So that at the Tenn home, it happened that your brothers were there? A. Yes.

Q. That means Chong Hing Tenn, Kui Hing Tenn, and your [219] father?

A. Yes. We were sitting waiting, after supper, we were sitting together.

Q. It was a family conference. Well, now, at the time, were you permanently residing at that home?

A. No. I was down here for a trip.

Q. Now, was Chong Hing Tenn permanently residing at the home at the time?

A. I don't recall. I think he was down here on several occasions.

Q. He was living out Kohala, wasn't he; he was still a Kohala boy? A. Yes.

Q. He was down here particularly interested in getting into the liquor business in Honolulu, wasn't he? A. No. Real estate.

Q. In business, anyway? A. In business.

Q. Because he was also trying to get you interested in the Motor Coach Cafe prior to that time? A. Yes.

Q. Was Kui Hing Tenn permanently residing at this home of your father at the time?

A. Yes. I think so. I don't recall. I think they were all staying there.

(Testimony of Fook Hing Tong.)

Q. Was Kui Hing Tenn practicing dentistry at the time?

A. I think he was working for the Palama Settlement.

Q. He wasn't married at the time? [220]

A. To my knowledge he was not.

Q. He is married now? A. Yes.

Q. Your mother was living at the time, was she? A. Yes.

Q. You also have another brother by the name of D. Hing? A. Yes.

Q. Was he living at that home at the time?

A. I think so. I don't really recall.

Q. How many bedroom home is that?

A. Only three.

Q. Three-bedroom home? A. Yes.

Q. This was true, you and Chong Hing Tenn weren't living there permanently, you just dropped in for a visit, is that right? A. Yes.

Q. When you had special conferences, is that right?

A. Not special conferences. We have to come there. It was the family home. We didn't have to gather there for a conference or anything.

Q. Well, you think sometimes when you came down from Maui you would go outside, you didn't eat at the family home?

A. I came to see my family.

Q. That night you had dinner at the family home, is that right? A. Yes.

(Testimony of Fook Hing Tong.)

Q. So after dinner, there was this conference, wherein Chong [221] Hing Tenn was present, Kui Hing was present, you were present, and your father was present, and Mr. Ching, isn't that right?

A. No. Mr. Ching wasn't there then.

Q. You mentioned he was there that night?

A. No. He came later. The first thing I knew of the Green Mill, somebody approached the subject, and said the Green Mill was for sale. I said nothing. Well, it is for sale, it is for sale.

Q. Then wasn't the amount mentioned \$25,000 or \$30,000?

A. Something like that. Something was mentioned about how much, but I wasn't sure whether there was really a purchase or not. There was nothing sure about it.

Q. Well, you know that Mr. Ching was to contribute \$3,000 into this venture? If you people were successful in buying this Green Mill, he was supposed to put in \$3,000?

A. He was supposed to contribute \$3,000 to me.

Q. I am just talking about that agreement.

A. Talking about that agreement, that agreement came after the purchase, after we were sure that the owner was going to sell.

Q. Well, now, wasn't it agreed at the time, at your home, that Ching was to put \$3,000 in and you people were to buy the balance?

A. No. Got your sequence wrong. You got the sequence wrong. I have not bought the place. I

(Testimony of Fook Hing Tong.)

don't know whether it is for sale. How can we make an agreement?

Q. In other words, what your brother Chong Hing Tenn [222] stated——

A. He just heard a street rumor it was for sale. I am just from the country, and green in the city then. I don't know what is going on at the time.

Q. You are not so green, Doctor Tong.

A. I have learned since.

Q. You attended the University of Hawaii, didn't you?

A. Yes, as a student. I didn't know much about business.

Q. You have been pretty successful in business during the war?

A. That is strictly luck, yes, that's all.

Q. I think it wasn't luck.

Mr. Waddoups: Well, let's not argue about it, shall we. Let's get the evidence in.

Q. So all of you got into Mr. Ching's car and went over to Mr. Lum's home; that you remember?

A. I remember after I heard that the place was for sale, I remember we had a discussion here, so Mr. Ching came, my good friend, I asked him, I said, "Do you know where Mr. Lum lives?" He said, "Yes. What is it?" "Well, there is a rumor that the place was for sale." He said, "Well, let's go up and take a look," and he called first on the telephone. Mr. Ching called. He was a live wire then, still is, I think.

(Testimony of Fook Hing Tong.)

Q. And he was the fellow that was hot—anxious about getting into the liquor business at the time, and getting you people into it with him, isn't that right?

A. Not getting me. He was going with me all the time, [223] taking me here and there.

Q. You just testified that you and he, before this conference at your home, checked into the liquor business from the Riverside Grille and the Green Mill, isn't that right? You were already angling for the purchase of the business?

A. We were angling all over, if anybody want to sell. We didn't know whether they want to sell or not. We were just feeling him out. I didn't know whether he was kidding or not. How can you find out if a man wants to sell or not. You go and ask him.

Q. You thought Mr. Lum was kidding you at the time that you and Mr. Ching went to see him about selling the business?

A. Mr. Ching was a nice fellow, happy-go-lucky, he goes around, and he asked everyone, "Do you want to sell this place? I will buy it." I thought it was all in fun, or what not, just to start the conversation—you could term it conversation, or something of that sort.

Q. You people were not seriously thinking about purchasing? A. That's right, Mr. Lee.

Q. You were just kidding around?

A. Kidding around. I wasn't kidding. He was the one that does that. I just sat down, that's all.

(Testimony of Fook Hing Tong.)

Q. Of course, Doctor, you were not kidding at the time when you sent Mr. Ching to telephone and call Mr. Lum about going up to the house?

A. I just want to find out if it was for sale.

Q. You were on business then? A. Sure.

Q. So immediately you went over to Lum's [224] home?

A. We got a ride, and got the old man to ride, if he wants to go.

Q. You go to Lum's home? A. Yes.

Q. You all went inside Lum's home?

A. I guess so.

Q. Mr. Lum agreed to sell to Mr. Ching, to you, and your brothers, his business for \$25,000, didn't he?

A. If I remember right, Mr. Lum struck up a very fast conversation with my father, saying that he was old time Chinese, and what not, and he would be glad to do business, and he was willing to sell the place for that stated amount. I don't know, but they told me I should put up a check, or somebody put up a check to bind the deal, and in the conversation that led on, Mr. Lum referred to Mr. Fong who handled his business. I told him, "Well, I know Mr. Fong well, too." So we have a mutual friend, I though the business could be taken care of in a more satisfactory manner.

Q. In other words, Mr. Lum agreed to sell to you and Mr. Ching and your brothers?

A. Yes.

Q. Mr. Ching was in the deal?

(Testimony of Fook Hing Tong.)

A. He was in the deal, right in the deal.

Q. Right up there, he was in the deal, you admit that? A. Yes, he was right in the deal.

Q. Didn't Mr. Lum also say that since he and your dad were old friends, etc., that you go on a trial period of operation, wherein he and his wife would offer their services in teaching [225] Mr. Ching and Mr. Chong Hing Tenn how to run the business?

A. Yes. That happened. I think it happened at the time.

Q. At the time——

A. I don't recall the sequence, but they were willing, or offered their services so that they learned the ropes.

Q. So the deal was closed so far as the agreement?

A. The agreement was closed, so far as——

Q. The amount and the price?

A. The amount and the price.

Q. It was just a question of what the inventory would cost? A. Plus the inventory.

Q. Yes, plus the inventory. Going back for a moment, at the conference at your home, the Tenn home, did you people discuss as to who was to run the business when you people purchased it?

A. No. We didn't. No such discussion.

Q. No such discussion?

A. It was just to buy on their terms. We didn't own the place.

(Testimony of Fook Hing Tong.)

Q. Just answer the question, please. Let the court draw its own conclusion. That is what we are here for. My question is was there any discussion concerning the duties of the respective partners? A. No discussion at all.

Q. Was there any discussion at the Lum home, after Mr. Lum agreed to sell for \$25,000, as to the respective duties of the partners? [226]

A. No discussion.

Q. Was there any discussion as to whether or not Mr. Ching was to leave the police force, to help manage the business there? Was there any discussion? A. Prior to that?

Q. Yes. A. No.

Q. Was there any discussion about your brother Chong Hing Tenn handling the finances?

A. No discussion at all at the time.

Q. Then after the conferences at Lum's home, then it was the understanding by all the parties that Hiram Fong was to handle the papers?

A. Yes.

Q. You left for Maui, around the latter part of September? A. Yes.

Q. You left with Kui Hing, your brother, some \$10,000? A. Yes.

Q. You are sure it wasn't \$15,000?

A. I don't quite remember. I don't think it was \$15,000.

Q. That's a lot of money. You don't know whether it was \$10,000 or \$15,000?

A. \$10,000.

(Testimony of Fook Hing Tong.)

Q. You are sure about that?

A. That's all I had.

Mr. Lee: Mr. Waddoups, may I have the bank statement, please?

Q. Did you have this bank statement of your brother? A. I saw it the other day. [227]

Q. Did you notice that your brother Kui Hing Tenn had \$248.34 in his account? A. Yes.

Q. That is as of September 25, 1941?

A. Yes.

Q. And that thereafter he deposited \$15,000 into his account? A. Yes.

Q. Does that refresh your recollection as to whether or not you put in or left \$15,000 instead of \$10,000?

A. I recall that he was handling my finances. He had a strong box that he put money in there. I recall now I also borrowed \$1,000 at that time.

Q. At the time, from whom——

A. I didn't borrow it, but——

Q. So you got \$1,000? A. Yes.

Q. You didn't leave with your brother, Kui Hing, \$15,000 total which he deposited in his account?

A. Well, yes, his money and my money was kept—we had a safety deposit box. Of course, I was going away. I left it up to him. He was just like a trustee, or something.

Q. You also noticed yesterday that the sum of \$10,000 was deposited on September 30, in his account? A. Yes. I noticed that.

(Testimony of Fook Hing Tong.)

Q. Does that refresh your recollection that \$15,000 was paid, and a check was drawn payable to Kam Hoo Lum, the owner of the Green Mill, in the sum of \$15,000? Did you [228] notice that, or does that refresh your recollection?

Mr. Waddoups: I might state, counsel, that it might expedite matters if you got that information from Kui Hing, because that is his account. I imagine he knows more about it.

Mr. Lee: I would be glad to expedite it. But I didn't know whether you were going to put Mr. Kui Hing on as a witness. I might not be able to ask him on a new matter.

Mr. Waddoups: I would be glad to do so, so that you may.

Mr. Lee: All right. I withdraw it.

Q. This letter of October 6, 1941, which you wrote to Mr. Ching—— A. Yes.

Q. You stated in that you had left, you had put in the business \$15,000.

A. That was what I thought. I think it was a mistake.

Q. When did you first discover that mistake?

A. Just now.

Q. Just now?

A. Just when you put that letter—showed me that letter, then I realized that it was a mistake.

Mr. Lee: I am a little fatigued. May Mr. Castleman continue the examination? Is there any objection by counsel?

(Testimony of Fook Hing Tong.)

Mr. Waddoups: I have no objection.

Q. (By Mr. Castleman): Thereafter, you went to Maui, and [229] you were in constant touch with your family and your brothers on the island here after you went back to Maui? A. No.

Q. You were not in touch with them at all?

A. No.

Q. When you left for Maui, what was the arrangement with respect to the accumulation of money to buy this business? You left some money with your brother? What was the arrangement with respect to the accumulation of the rest?

A. Mr. Ching was supposed to give me \$3,000.

Q. When? A. As soon as he could get it.

Q. Now, on October 6, you wrote a letter which is in the record as Exhibit A, I think.

The Court: Yes.

Q. This was October 6, you identified this letter. You recall having written it, as I remember your testimony, and in this letter you tell him that he has three shares in the business, do you recall that? A. I reserved three shares.

Q. No, that's not—I will ask you if you state in here, Doctor, that you have fifteen shares, and “you,”—meaning Ching—“have three.” That is what it says. “That is if you get the dong by then.” What do you mean by that? Then what did you mean “by then”? You wrote the letter on October 6, on Maui. Now, it would take that letter some period of time to reach its destination,

(Testimony of Fook Hing Tong.)

would it not, to reach Mr. Ching? It would take some days—— [230]

A. A couple of days, I think.

Q. A couple of days. On October 8, he gets a letter from you, in which you tell him that he has three shares. That's what you said in your letter, isn't it? A. Yes.

Q. You say, "That is if you got the dong by then." What do you mean "by then"?

A. By the time that he gets this letter.

Q. You wrote the letter on the 6th?

A. Yes.

Q. Which he would receive, we will assume, on the 8th? A. Yes.

Q. In the letter you told him that he has three shares, provided that he gets the dong by then. Now, you are an educated man, what did you mean by "then"? A. I just said.

Q. Well, I didn't understand you, Doctor, I will ask you to explain your answer a little further.

A. I say upon the receipt of this letter he should have the money ready, at all times since the inception of this deal. I have been asking——

Q. You are a professional man, you have sent bills to your patients for services rendered?

A. Yes.

Q. You certainly do not expect us to believe that you expect the patients to have payment for those bills in your office on the same moment——

Mr. Waddoups: I object to that, your Honor, as—— [231]

(Testimony of Fook Hing Tong.)

The Court: Sustained.

Mr. Castleman: If your Honor please, I submit that——

The Court: The court has ruled.

Q. Now, isn't it a fact that at the very moment that you were writing Mr. Ching, assuring him that he had three shares in the business, your brothers and yourself had already made arrangements with Hiram Fong to draw up the papers?

A. No.

Q. You wrote the letter on the 6th, and you heard the testimony of some of the witnesses, the witness Hiram Fong this morning, stated on October 7, or on October 6, the same day that you wrote this to Ching, that he wrote the liquor commission requesting transfer of the business to you and your brothers, you heard that, didn't you?

A. That is preliminary.

Q. You also heard Mr. Fong testify, did you not, that his instructions in this matter had come from your brother, did it not? A. Yes.

Q. Isn't it true, then, Doctor, that on the very day that you wrote Mr. Ching that he had three shares in the business, your brother had already taken steps with the lawyer to see that he was excluded?

A. Not excluded, only as I held these three shares, because in that partnership it would be if Mr. Ching had his money. The business had to go on. I had his three shares, he can take it out

(Testimony of Fook Hing Tong.)

of my share any time that he showed the [232] money. He wanted me to finance him. I said I could not. I said, "That is not according to business rules."

Q. Do I understand that you were willing for him to have three shares in this business any time that he produced \$3,000?

A. At the moment, yes.

Q. If he tendered you \$3,000 now would you give him three shares in the business?

A. That was subsequently in the letter.

Q. If you got—if he tendered you \$3,000 now, would you give him three shares of your interest in the business? A. No.

Q. I understood that was your version of this arrangement.

Mr. Waddoups: The testimony was at the time, Mr. Castleman.

Q. When he came to Maui to see you, he was pretty much outraged, wasn't he? A. Who?

Q. Mr. Ching.

A. No. He was very submissive.

Q. He was very submissive? A. Yes.

Q. And you felt—you thought that you had done right by him?

A. I felt that he didn't do right by me. I believe this letter shows that. I backed him to the limit. That he didn't carry out instructions. He didn't back me up.

Q. You felt when he visited you at Maui that he hadn't [233] done right by you? A. Yes.

(Testimony of Fook Hing Tong.)

Q. Now, I believe you testified the other day when you were on the stand that he visited you on Maui about October 12, is that true?

A. That's right.

Q. Now, you wrote the letter on October 6, which he received, we will assume, on October 8, in which you appeared to back him up all the way. Isn't that the sum and substance of this letter?

A. That was the purport of it.

Q. Now, four days later you saw him on Maui?

A. Yes.

Q. You felt that he has not done right by you, is that right?

A. That's it.

Mr. Waddoups: Are you through, Mr. Castleman?

Mr. Lee: Just a moment.

Q. (By Mr. Lee): Doctor, you were sort of head man in this transaction, weren't you?

A. So far as Mr. Ching and I was concerned, I was the head of my own. My \$10,000 had been invested, sure.

Q. You also felt the pressure and the responsibility of criticizing your brother pretty heavily, did you not?

A. So far as that is concerned, we have spats, that's natural.

Q. On October 6, you did write a letter to your brother in which you used some pretty strong language, did you not? [234]

A. That's what it says.

Q. At the time you had the utmost faith and confidence in the petitioner, Ching, did you?

(Testimony of Fook Hing Tong.)

A. Yes.

Q. When you wrote this letter that you told him to vacate or get out, when did you do that?

A. I think it was about around Thursday, I think.

Q. Thursday?

A. On the 9th. I think I checked these dates up. The 9th was Thursday. Monday was the 6th. That was the date, Monday afternoon. I checked on the Inter-Island at the time. My recollection of checking these things—it was in 1944, when it first came up—I got to refresh my memory, so I checked around for the date. It was hazy to me then.

Q. You wrote this letter calling on him to vacate after he came to Maui?

A. No. Previous, between this letter and his arrival.

Q. Well, now, let's see, you say that he arrived in Maui on October 12.

A. I wrote from Maui a second letter.

Q. You testified, I believe, that he came to Maui on October 12. A. Yes.

Q. Prior to that, you had written him a letter to vacate? A. Yes.

Q. How long before? Before he got to Maui?

A. Well, between this letter, the date of this letter, and the 12th, some time in between. Mostly likely it was steamer day, Thursday. [235]

Q. Between the letter of the 6th, and the 12th, you wrote a letter, telling him to vacate?

A. Yes.

(Testimony of Fook Hing Tong.)

Q. What prompted you to write that letter?

A. Well, adverse reports.

Q. I thought you advised me that you were not in communication with folks over here.

A. I had a letter from my brother then, answering my letter to him. Then there were people coming up for the fair. They gave me all kinds of reports of what is going on over there, that Mr. Ching was in there. He was ruining business. He has two or three shots, and then he calls all his friends in. Then he is trying to live on the house. Everything is on the house. A certain fellow seen him take a bottle out, jeopardizing the business license. There is other occasions, too.

Q. That is what some other people told you.

A. Reports came in from people that I told them to take a look, too.

Q. Well, now, let's see, Doctor, on the 6th you wrote a letter telling him he was in? A. Yes.

Q. A letter which appeared to back him to the hilt? A. Yes.

Q. Which told him he was in, if he put up the dong by then, to use the words of your letter.

A. Yes.

Q. Now, two or three days later, when you wrote him two [236] or three days later—I understand you wrote him another letter telling him to vacate at the time, is this true—when he still was, under your view of the matter, an interested partner?

A. I told him to go in there as representing me, if he proved anything, I would sell him three

(Testimony of Fook Hing Tong.)

shares. I was still holding three shares for him, if he would go in there and prove himself as a good manager, and help the business. Instead of doing that, what he did, we were going to lose business. I'm sorry at my action, your Honor——

Q. Later, did you send to Mr. Ching, on the 6th, enclose a copy of a letter that you sent to your brother on the same day, isn't that true?

A. Correct.

Q. Now, you say that you also wrote him a letter telling him to vacate, because of the receipt of a letter from your brother, in answer to the one that you wrote him, as well as reports from people over there?

A. Everything. I had two brothers writing me letters, and other people writing me, too. It all came in a rush. That was boat day.

Q. Well, now, Doctor, are you sure that you are correct in fixing the time of these matters?

A. Well, from that letter, and the time that he showed up, perfectly, because in 1944, I checked those records.

Q. We have got two days, we have got the 6th and the 12th, a matter of six days between.

A. A matter of six days. [237]

Q. Under your testimony, a letter from Maui—this was back when I take it that air service was somewhat less than it is today, isn't that true?

A. I don't remember.

Q. In fact, the letter that you mailed to Mr. Ching was not even an airmail letter?

(Testimony of Fook Hing Tong.)

A. I think we had some army privileges. I don't recall that. But it was boat night, I remember that.

Q. It went out by boat? A. Most likely.

Q. So you don't know when it got here?

A. Probably the boat landed the next day.

Q. You don't know that you mailed it on the same day that the boat sailed?

A. I went down and mailed it. All our other mail was going, military and what not.

Q. Do you remember that this letter was posted on the same day that the boat sailed? A. Yes.

Q. Do you remember that, after these years?

A. Of course, I wouldn't get an answer.

Q. Do you remember that, Doctor, or are you just guessing?

A. I remember it, because I know our mails go through, military and regular, that is the only day that they mail. That is the boat day.

Q. So, the gist of the story as I get it is that within a space of less than a week, you went from hot to cold in this thing, so far as Ching is concerned, is that right? [238] A. Yes.

Q. Notwithstanding the fact that you assured him, in the letter of the 6th, that he was in to the tune of three shares?

A. So far as I am concerned.

Q. And failed to indicate to him any date within which you would expect him to contribute his portion of the money, isn't that true? Your letter of the 6th does not indicate any date, does it?

(Testimony of Fook Hing Tong.)

A. No. I held it for him, I think, due on the 1st of the month.

Q. And notwithstanding that, four or five days later you wrote and told him to vacate, isn't that true?

A. After hearing reports, yes, I wrote him that.

Mr. Lee: That's all.

Mr. Waddoups: No further questions.

(Witness excused.)

Mr. Waddoups: I will call Mr. Centio, please.

WILLIAM CENTIO

called as a witness on behalf of the respondents,
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Waddoups:

Q. State your name, please?

A. William Centio.

Q. What is your business or occupation?

A. Police officer, City and County of Honolulu.

Q. How long have you been a police officer, Mr. Centio?

A. About eighteen years.

Q. Do you know the petitioner in this case, Hung Chin Ching? [239]

A. I do.

Q. How long have you known Hung Chin Ching?

A. About fifteen years.

Q. Are you acquainted with one Fook Hing Tong, otherwise known as "Bear" Tong?

A. Yes.

(Testimony of William Centio.)

Q. One of the respondents in this case?

A. Yes.

Q. Calling your attention to the month of October, 1941, were you on the Island of Maui? At the time of the Maui fair? A. I was.

Q. While you were on that island, during the fair, did you have occasion to see Doctor Tong?

A. I did.

Q. Where did you see him first?

A. He was captain in the army.

Q. He was captain in the army?

A. I met him at the camp where he was staying.

Q. While you were on that trip, how long were you on the Island of Maui, at that time, on that occasion? A. About four or five days.

Q. How did you come back to Honolulu?

A. On the boat.

Q. Is there anyone in this room who was on the boat while you were, with you, at the time that you returned? A. Yes, Mr. Ching.

Q. While you were on the Island of Maui, did you see Mr. Ching in the company of Doctor Tong?

A. Yes. [240]

Q. And where was that that you saw the two of them together?

A. At the house on Maui.

Q. Do you recall any conversation between Doctor Tong and Mr. Ching relative to a business venture? A. No.

Q. Do you recall any other conversation at any other place other than at this house? A. No.

(Testimony of William Centio.)

Q. Where else did you see Mr. Ching?

A. Down at the docks.

Q. Did you overhear any conversation between them at the time, at the docks? A. I did.

Q. And what was the substance of that conversation, if you recall?

A. Ching asked Doctor Tong something to the effect of, "What about it?" The doctor, Doctor Tong stated words in the negative that it was no good; it was all out, something to that effect.

Q. Coming back on the boat, did Mr. Ching make any comment to you about his trip to Maui?

A. He did.

Q. What was that comment?

A. He stated that it looked like he made the trip for nothing to Maui.

Mr. Waddoups: Your witness.

Mr. Lee: No questions.

(Witness excused.) [241]

KUI HING TENN

a respondent herein, was recalled, and testified further as follows:

Direct Examination

By Mr. Waddoups:

Q. State your name, please?

A. Kui Hing Tenn.

Q. Are you the same Kui Hing Tenn who testified earlier in this proceeding? A. Yes.

Q. I will call your attention to a statement from the Bank of Hawaii, which appears under the name of Kui Hing Tenn, and ask you to examine it.

A. That is my statement.

Q. Is that a statement of your account with the Bank of Hawaii? A. Yes.

Q. For the month of October, 1941?

A. Yes.

Mr. Waddoups: May we offer this for identification, please?

The Court: It will be received, and marked Respondents' Exhibit 2.

(The document heretofore referred to was marked Respondent's Exhibit 2 and received in evidence.)

(Testimony of Kui Hing Tenn.)

RESPONDENTS' EXHIBIT NO. 2

If No Error is Reported in Ten Days
the Account will be Considered Correct

Bank of Hawaii

In Account With

K. H. Tenn
1927 Coyne Street
Honolulu

Statement of your account to close of business Oct. 20th, 1941.

Checks in Detail	Date	Deposits	Date	Balance
Balance Brought Forward			Sept. 20	258.34
10.00—			Sept. 25	248.34
25.00—	Sept. 29	15,232.60	Sept. 29	15,455.94
15,000.00—	Sept. 30	10,000.00	Sept. 30	10,455.94
127.10—			Oct. 3	10,328.84
	Oct. 4	60.00	Oct. 4	10,388.84
60.00—			Oct. 7	10,328.84
10,000.00—			Oct. 9	328.84
40.00—			Oct. 10	288.84
3.64— 5.95— 3.10—			Oct. 11	276.15
7.72— 66.03—			Oct. 13	202.40
3.40— 10.18—			Oct. 14	188.82
4.35—			Oct. 16	184.47
	Oct. 20	150.00	Oct. 20	334.47

Filed Oct. 12, 1948, Supreme Court T. H.

Received in evidence June 24, 1948, Circuit
Court T. H.

Q. Calling your attention to Respondents' Exhibit 2 for identification, particularly to the deposit after the date of September 29, in the amount of \$15,232.60, please tell the court where the money came from that is represented by that deposit?

A. I had \$10,000 from Fook Hing Tong, and \$5,000 of my own which we had in a safety deposit

(Testimony of Kui Hing Tenn.)

box there, and \$232.60 from my monthly check from the Palama Settlement.

Q. I call your attention to a deposit in the same exhibit, after the date of September 30, for \$10,000, tell us where that came from?

A. This amount came from Chong Hing Tenn. He had a check from Hawaii, so I thought it would be better for me to deposit that money in my account and write a check on that.

Mr. Waddoups: We offer this statement in evidence, your Honor.

The Court: It has been received. It will keep the same marking.

Q. I will call your attention to an order, a charge order on the Bank of Hawaii, dated September 30, in favor of Kam Hoo Lum, charged against K. H. Tenn, No. 1989, in the amount of \$15,000. Will you examine that, please.

The Court: What is the date of that, please?

Mr. Waddoups: September 30.

Q. Do you know what that represents?

A. We wanted a certified check for deposit.

Q. Had that anything to do with the purchase of the Green Mill?

A. Yes. That was the down payment on the Green Mill.

Q. Did you secure a certified check?

A. Yes.

Q. What did you do with that check?

A. I took it to Hiram Fong's office.

Q. Do you remember when you took it? Do you

(Testimony of Kui Hing Tenn.)

recall whether [243] it was the same day that the draft was issued, or another day or when?

A. I believe it was right after that, anyway, within a day or so.

Mr. Waddoups: We offer this in evidence.

The Court: It may be received, marked Respondents' Exhibit 3.

(The document heretofore referred to was marked Respondents' Exhibit 3, and received in evidence.)

RESPONDENTS EXHIBIT NO. 3

[Charge order]

Honolulu, Hawaii, Sep. 30, 1941. No. 1989.

[Stamped]: Exchange Dept.

Bank of Hawaii

Charge K. H. Tenn \$15,000.00

For Check No. 640 in favor of Kam Hoo Lum

Certified this day.

/s/ ILLEGIBLE

Asst. Cashier.

Received in evidence June 24, 1948, Circuit Court T. H.

Filed Oct. 12, 1948, Supreme Court T. H.

(Testimony of Kui Hing Tenn.)

Q. I will call your attention to a cancelled check, dated October 2, 1941, number 643, in the sum of \$10,000, made payable to Kam Hoo Lum, signed K. H. Tenn. Are you familiar with that check? A. Yes.

Q. Has this check anything to do with the purchase of the Green Mill?

A. This check was supposed to be Mr. Tenn's \$10,000 to pay for the balance of the Green Mill.

The Court: That was Chong Hing Tenn?

A. Yes.

Q. Did you deliver this yourself?

A. Yes. I guess so.

Mr. Waddoups: We offer this in evidence.

The Court: Respondents' Exhibit 4.

(The document heretofore referred to was marked Respondents' Exhibit 4, and received in evidence.)

RESPONDENTS' EXHIBIT NO. 4

Honolulu, Hawaii, U. S. A. October 2, 1941 No. 643

Bank of Hawaii 59-102

Pay to the

Order of Kam Hu Lum

\$10,000.00

Ten Thousand dollars only

Dollars

/s/ K. H. TENN.

Mr. Waddoups: You may cross-examine. [244]

(Testimony of Kui Hing Tenn.)

Cross-Examination

By Mr. Lee.

Q. Mr. Tenn, in other words, this \$25,000 was paid about October 1 or 2, to Hiram Fong's office, is that right? A. About that.

Q. Under your testimony? A. Yes.

Q. And at the time already you people had told Hiram Fong to draw up the partnership papers?

Mr. Waddoups: I object to that, improper cross-examination, not covered on redirect examination.

Mr. Lee: I think it goes to the matter of,—

The Court: That is part of the action. Objection overruled.

Q. Isn't that right?

A. I don't know about that, but I think the owners wanted the money in, to show good faith before the drawing up of any papers. I don't know about drawing up the papers, I delivered—

Q. You delivered the money to Hiram Fong's office, their lawyer, didn't you? A. Yes.

Q. The deal was closed when you deposited that money there?

A. I don't know whether it was closed or not. They wanted the money, to transact business. The owners of the Green Mill then wanted to have the money before they would,—

Q. Certainly. I can understand the owners of the Green Mill wanting the money. I can understand that. I can understand, also, the purchasers of any business, when you pay \$25,000, they want

(Testimony of Kui Hing Tenn.)

to own that business. Didn't you people get that business [245] October 2, 1941?

Mr. Waddoups: Calling for a conclusion of the witness, your Honor. All the documentary evidence is in, showing when title to the business was transferred.

Mr. Lee: I will reframe the question, your Honor.

Q. On October 2, 1941, didn't you think that you people had already bought the business when you paid over the check?

A. Well, I think we bought the business, but I don't think we had the business then.

Q. Weren't you people already operating the business? A. On a trial basis.

Q. On a trial basis? A. Yes.

Q. When you paid that money in October 2, 1941, do you recall then that you had already, or you and your brother,—that your impression was that Mr. Fong was instructed to draw up the necessary papers, including the articles of copartnership among the three brothers, and excluding Mr. Ching?

A. I don't know whether he was instructed to exclude Mr. Ching or not. Maybe he was instructed to draw up the papers.

Q. Who instructed him to draw up the papers?

A. I don't know. Maybe Mr. Lum, maybe we left it to him.

Q. You mean that you left it up to Mr. Lum to tell Mr. Fong who the partners where who were purchasing the business?

(Testimony of Kui Hing Tenn.)

A. Well, he knew my brother. So I don't know, maybe they had instructions. I don't know.

Q. As I understand it, Mr. Tenn, you want this court to believe that Mr. Lum told Mr. Fong who the partners were? A. No. No. [246]

Q. In these days? A. No.

Q. Well, who told Mr. Fong, do you know?

A. I don't know.

Q. You don't know; you didn't?

A. I did not.

Q. Did you indicate to Mr. Fong in any way at the time that you gave the two checks, October 2, 1941, as to who the partners were?

A. I did not.

Q. You did not? A. No.

Q. Did you leave that to Mr. Chong Hing Tenn?

A. I don't know.

Q. At the time, October 2, 1941, was Mr. Chong Hing Tenn living in the same house that you were at your dad's place?

A. On the 2nd? I guess he was.

Q. Now, did he know about your delivering this \$25,000 to Mr. Fong for the purchase of this business, when you went over there to purchase it?

A. I guess he did.

Q. In fact, you talked it over with him, didn't you?

A. I don't know. I talked it over with him, I must have had a telephone call from Fong's place, to deliver that money.

Q. Didn't you have a talk with Mr. Chong Hing

(Testimony of Kui Hing Tenn.)

Tenn about it, so that you proceeded to get that money and pay it over to Fong, isn't that right?

A. I don't recall talking it over with him, but we had an understanding that we were going to deliver that money. [247]

Q. When did you have the understanding? When did you reach that understanding?

A. When we put the money in the bank, we have to pay it any time when they called for it.

Q. Was that September 29 that you had that understanding?

A. I understand that we would have to pay that money.

Q. Yes. I know that, but did you have an understanding on September 29 or 30 when this money was deposited, that you had \$15,000; \$10,000 from Bear Tong,—Fook Hing Tong, and \$5,000 from you that was deposited as the bank statement shows September 29, and the bank statement also shows the sum of \$10,000 was deposited, which was identified as Chong Hing's. Did you have that understanding that that \$25,000 was to be paid by the three brothers; that the three brothers would be partners in this business?

A. I wanted to pay that money, to pay for the Green Mill. I didn't understand about the partnership then.

Q. Well, the purchase price was \$25,000, wasn't it? A. Yes. We want to get the business.

Q. Yes, I know. \$15,000 from you and Doctor Tong, and \$10,000 from your brother, makes \$25,000? A. Yes.

(Testimony of Kui Hing Tenn.)

Q. So that you three brothers purchased the business by October 2, 1941, didn't you?

A. Yes.

Q. When Chong Hing Tenn put in the last \$10,000 September 30, 1941, didn't you three have an understanding,—didn't you three brothers have an understanding that you people were the ones who were purchasing the business, that you were the partners in [248] the new business?

A. I guess so.

Q. You think so? A. Yes.

Q. In fact, it is your impression that your brother, Chong Hing Tenn told Mr. Fong that, that the three brothers were the partners in this business, isn't it? A. I don't know if he told Fong that.

Q. You don't know? A. No.

Mr. Lee: No further questions.

(Witness excused.)

Mr. Waddoups: At this time we request the continuance of this case for the purpose of completing our evidence. On the afternoon of June 22, I saw Mr. Arthur Pai at his place of business on Nuuanu,—June 22nd, of this year, meaning the day before yesterday. I questioned him about the matter which we considered very material. I might state that his attitude toward me at the time was somewhat hostile. He gave me no indication of any kind that he planned to go to Maui that night. I did indicate to him, however, that he would be called, and to that end a subpoena was issued. The record now shows,

through the testimony of Mr. Soares, that this witness is on the Island of Maui. We don't know when he will be back.

For the purpose of the continuance, I would like to make an offer of proof as to what he would state. We consider it very material to the issue: Namely, that some time after the blitz, at the time when the bars were closed, the petitioner, [249] Ching stated to him,—Pai,—that it was a lucky thing that he had not put any money in the Green Mill. To that end, your Honor, we will ask that the case be continued.

The Court: Is that all the evidence?

Mr. Waddoups: That's all the evidence.

The Court: That concludes the respondents' case?

Mr. Waddoups: Yes, your Honor.

The Court: I don't presume that the petitioner would stipulate, if called, he would so testify?

Mr. Lee: Well, I don't know. This is a new thing.

The Court: Can counsel advise the court how much rebuttal he would produce, or if he is going to put in any rebuttal, how long it would take?

Mr. Lee: Well, your Honor, from where I sit right now, I don't think there will be very much rebuttal, other than Mr. Ching's, in rebuttal to something Doctor Tong testified to. It would not take more than ten minutes.

The Court: What I would suggest is this: From the return of the high sheriff, and from the statement made by counsel for the respondents as to the attitude of Mr. Pai, it would appear that there is

quite a possibility of Mr. Pai trying to evade service. I would suggest that a new subpoena be issued, and Mr. Pai be subpoenaed returnable at 8:30 on the first secular day after service, and that whatever high sheriff it is given to, report back to counsel for both parties,—Mr. Lee is in town, you can take care of Mr. Castleman,—and that if that time is convenient for both parties to be in court, well and good, if it is not, then the witness may still appear and [250] be ordered to return at such other time as would be proper. Now, either counsel, or both counsel may be here on the return, but I just take it from what has been stated here in court that there is quite a possibility that the witness is endeavoring to outwit service.

Mr. Waddoups: I think that is a splendid way to solve the problem.

Mr. Lee: The only thing your Honor is, as I get it, there is no date certain when we are to meet and conclude the case.

The Court: I have tried to make it as certain as I can. We can't say such and such a day. The idea is this: Suppose that he is served today, that would be for 8:30 tomorrow morning.

Mr. Lee: Why can't you set a date certain, and I can get this case off my mind.

The Court: For the simple reason that it cannot be certain when the witness will be subpoenaed. That is why I am not setting a day certain. We cannot conclude it until we get this witness. We would have the sheriff serve him immediately. That seems

to be the most expeditious way to get it as soon as possible.

Mr. Waddoups: I can state this, for counsel, as soon as I am advised that he has been served, I will certainly notify counsel, and we can set a day that is convenient. We can then wait upon your Honor.

Mr. Lee: Well, as I understand the present status of this case, your Honor, the respondents have rested, save [251] and except the calling of this witness, Pai, save and except this thing that was mentioned as to when the fair took place.

Mr. Waddoups: No. We can't say that we rested. We don't know what the attitude of this witness is. It may be we will have to lay the groundwork for impeachment, and we will have to put witnesses on to impeach him, being perfectly frank with counsel. For that reason I cannot let the record assume that.

The Court: You have no other witnesses at the present time under the situation as you know it that you can call.

Mr. Waddoups: No, your Honor. I have not.

The Court: If the testimony is as you have made your offer of proof, you feel that that would conclude the case.

Mr. Waddoups: Yes, subject to the stipulation that counsel and I will enter into.

Mr. Lee: That is what I want to understand.

The Court: All right. We understand the situation. The court wants to get rid of this as soon as he can, too. I just suggested this course, feeling that it was probably the fastest way.

(Whereupon the matter was adjourned until June 26, 1948, at 9:00 o'clock a.m.) [252]

June 26, 1948, 9:00 o'clock A.M. Session

ARTHUR PAI

called as a witness on behalf of the respondents,
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Waddoups:

Q. State your name, please.

A. Arthur Pai.

Q. Where did you live? A. 1617 Kaimuki.

Q. Do you know a man by the name of Fook Hing Tong? A. Yes.

Q. Otherwise known as Bear Tong?

A. Yes.

Q. Do you know a man by the name of Chong Hing Tenn? A. Yes.

Q. Do you know a man by the name of Kui Hing Tenn? A. Yes.

Q. Are you familiar with the premises in Honolulu known as the Green Mill?

A. Yes. On Bethel street.

Q. Do you know a man by the name of Hung Chin Ching? A. Yes.

Q. A sergeant in the police department?

A. Yes.

Q. Do you remember shortly after the so-called blitz having any conversation with Sergeant Ching concerning the Green Mill?

A. I had a few conversations with him.

Q. Do you remember him saying anything about putting money [253] in the Green Mill?

(Testimony of Arthur Pai.)

A. That I don't know, sir.

Q. You don't remember?

A. I don't remember.

Q. Do you deny having said anything about him putting money in the Green Mill to anyone?—I withdraw that question,—Have you ever said, or have you ever told Fook Hing Tong, Chong Hing Tenn, or Kui Hing Tenn that Ching said anything to you about putting money or not putting money into the Green Mill?

Mr. Lee: We object to that. Whatever this man said to the respondents is inadmissible to the issue in this case. He could have told the Tenn brothers that the moon was green.

The Court: This is a matter of laying a foundation, I take it. Objection overruled.

Q. You have never said anything to either of those men about Ching telling you something like that, is that correct? A. Yes.

Q. Do you recall me calling upon you at your place of business on Tuesday, June 22, in the afternoon? A. Yes.

Q. Do you recall me talking to you about this case? A. Yes.

Q. Do you recall me asking you at the time if you had discussed Sergeant Ching's interest in the Green Mill with any of the Tenn brothers?

A. Well, I told you Tong, he asked me to be a witness. I told him I didn't know enough about the case. I told you the same thing. You ask me about

(Testimony of Arthur Pai.)

an incident away back. I told you that I couldn't recall. [254]

Q. That's right. So you deny having made any statement to either of the Tenn brothers about Ching's interest in that business shortly after the war started? A. No.

Q. Did you talk to Mr. Bear Tong?

A. Bear Tong?

Q. —about this case a few days before,—a couple of weeks ago?

A. Well, he came to my house, I believe it was on the 17th, that was Thursday. He came up to my house and asked me to be his witness. I told him to go down to see you. I told him I could not, because I knew him, I knew Ching. And the case, so far as the case was concerned, I didn't know enough to be a witness for either party.

Q. Do you recall telling him at the time that you remembered Ching telling you about it?

A. No, sir.

Q. You didn't want to testify because you knew both parties? A. No, sir.

Q. You deny saying that to Doctor Tong?

A. Yes.

Mr. Waddoups: I think that's all, your Honor.

Cross-Examination

By Mr. Lee:

Q. How long have you known Doctor Tong, Fook Hing Tong?

A. Oh, over,—about 25 years.

(Testimony of Arthur Pai.)

Q. Were you friends with him before you knew Mr. Ching? A. Yes.

Q. How long had you known Hung Chin Ching, approximately? [255]

A. About a little over 10 years.

Q. Would you say that you are a better friend of Doctor Tong's than you are of Mr. Ching, vice versa, or is it the same?

A. Well, I treat everybody the same.

Q. Both friends of yours?

A. Of course. Doctor Tong has been my family doctor for quite a while. When he come up to me, he talked to me as if I was obligated to him, asked me to be a witness, which I could not.

Q. Didn't Doctor Tong also tell you that he wanted you to come to court to testify that Ching told you that he was glad that he didn't put any money into the Green Mill? Didn't Doctor Tong tell you that?

A. Well, he mentioned that to me that he didn't put,—Ching didn't put no money into the Green Mill. After the blitz I was in there one time, and the party that they purchased the place from,—what's his name, Long John,—we were kidding. We were talking, and he told me to kid him that he was a smart man for selling the place because the place was closed up for a while, so far as liquor is concerned.

Q. Now, do you remember, approximately during the months of September and October, 1941, seeing Mr. Ching helping run the place, the Green Mill? A. Yes, that I did.

(Testimony of Arthur Pai.)

Q. Did you go over there and eat and have a drink now and then? A. Yes. I did.

Q. And did you notice who was running the place, just like the owner?

A. Well, I understood that both were to be co-managers. He [256] was the one of them that was working around and trying to build up the place.

Q. Mr. Ching? A. Mr. Ching.

Q. Who was the other fellow?

A. Chong Hing Tenn.

Q. You know Chong Hing Tenn, too, don't you?

A. Yes.

Q. Now, during that period, when Mr. Ching was there, did you notice whether or not he was drinking on the premises? A. At no time.

Q. Do you recall having several conversations with any of the Tenn brothers, concerning Mr. Ching's part in obtaining the purchase of the Green Mill, about that time? Do you recall?

A. Well, in the beginning, when Chong Hing Tenn came down here, he is from the other island, he was looking for a business, and I believe Sergeant Ching went around and found this place, and then took part. I understand that they got together and they purchased the place,—from hearsay.

Q. He told you that Ching,—I mean the Tenn Brothers? A. The Tenn brothers told me.

Q. The Tenn brothers told you that?

A. And Mr. Ching himself told me that.

Q. Do you recall any conversation with the other

(Testimony of Arthur Pai.)

manager, Chong Hing Tenn, about some time in September, 1941, close to that time?

A. Whether or not there was any mention or conversation concerning whether Mr. Ching was to be in the partnership?

Q. No. Purchasing the business. Do you recall anything? [257] In other words, did Mr. Chong Hing Tenn ever talk to you about whether or not Mr. Ching was,—to be frank,—to be ousted from this business? A. That I don't recall.

Q. You could not recall that? A. No.

Q. Did any of the Tenn brothers indicate to you that they were going to,—at the time,—squeeze Mr. Ching out? A. That I couldn't remember.

Q. However, it was your impression, from your conversation with the Tenn brothers and Ching that he was going to be, or that he was one of the purchasers of the business, is that right? A. Yes.

Q. You can't recall whether or not Chong Hing Tenn, or any of the other brothers told you that they were going to squeeze Sergeant Ching out? Try to recall any conversation that you may have had?

A. I can't recall.

Q. That you can't recall? A. No.

Mr. Lee: No further questions.

Redirect Examination

By Mr. Waddoups:

Q. If I understand your testimony, you deny having told any of the Tenn brothers that Ching

(Testimony of Arthur Pai.)

had told you he was glad that he didn't put any money in that business after it was closed up?

A. Yes.

Q. You deny that? A. Yes. [258]

Mr. Waddoups: That's all.

Mr. Lee: That's all.

(Witness excused.) [259]

First Circuit Court,
Territory of Hawaii—ss.

I, Sidney H. Minns, shorthand reporter for the Territory of Hawaii, do hereby certify that I reported in shorthand the testimony taken and proceedings had before the Honorable Willson C. Moore, Circuit Judge, at Honolulu, T. H. in the matter of Hung Chin Ching vs. Fook Hing Tong, et al., No. E-4416, commencing June 21, 1948. That I transcribed the same, and that the transcript hereto annexed is a true and correct transcript of my shorthand notes so taken.

/s/ SIDNEY H. MINNS.

Honolulu, T. H. October 9, 1948. [260]

Friday, July 2, 1948, 9:30 o'Clock A.M.

(Continued argument by Mr. Lee.)

(Argument on behalf of petitioner by D. R. Castleman, Jr.)

(Argument by Mr. Lee.)

The Court: Well, from this evidence it appears that originally there was an agreement between these three brothers and Ching here to go into a joint venture of a partner arrangement for the purchase of the Green Mill, and the uncontradicted evidence is that Ching—the extent of Ching's ownership, was to be three thousand dollars; the purchase price of the business was \$25,000, and in addition to that there was an approximately \$10,000 for the stock in trade, the inventory, and according to the evidence that inventory was paid out of the income of the business, and that none of the parties contributed anything above and beyond their original investment.

It appears that this agreement entered into by the four parties was in the latter part of September, 1941. There is no question about it, either between the members, [261] the seller of the business, or Hiram Fong, that in the first instance, that is, at the beginning of these negotiations, that Ching, the petitioner, was part and parcel of this venture.

Then we come to the steps that followed. It appears that this Dr. Tong had a great deal of faith in Ching and he wanted him to look after his

interest in the partnership of the Green Mill and in addition to having three thousand dollars interest he was to act as manager to some extent, and have charge of personnel. Brother Chong was to take care of the financial situation in the enterprise at issue, bank the money and pay the bills, and what have you.

There is also evidence, in the evidence, that from the time of the meeting of the minds for the sale and purchase of the Green Mill up until the time, at least, of the transfer of the liquor license, which had to be approved by the Liquor Commission, that there was a transient period in which the former owners and the new purchasers were operating the business together.

I think there is a slight conflict in the testimony as to whether Long John, as they call him, got the money out of that period or whether the others got the money. Of course there is no particular materiality to that. However, during that period it does appear that the prospective purchasers were more than satisfied with the agreement they had entered into, and it looked to them as being a very good thing.

From the inception of the operation of the Green Mill by the brothers, of which Chong Hing was the active [262] participant, taken from the testimony and the circumstances, and what eventually ended up, it appears to this Court that Chong Hing was not particularly interested in, and was possibly opposed to, having Ching become a partner in this business. It is apparent from the letter written by

Dr. Tong to his brother, and also the letter to Ching, that he was very insistent that Mr. Ching participate in the partnership. In that particular letter, which is Exhibit "A," Dr. Tong said that he had \$15,000 and that if he, if Ching, would put up the \$3,000, why then [copy obliterated] Just what that means is problematical.

It is apparent that when they come right down to drafting the partnership papers themselves that there was a desire to leave Ching out of the picture.

It is contended by the Tenn brothers that there were at least two reasons for this: 1. That although he had been repeatedly requested to put up his \$3,000 he did not do it, and, second, that his conduct at the Green Mill with reference to drinking, and I believe also there was some intimation that he had too much drinking on the house—that it was not good for the business.

Dr. Tong testifies that he felt that Ching, instead of looking after his interest, and doing what was right, had double-crossed him. What that double-cross was is pretty clear, and taking all the circumstances into consideration this Court arrives at this conclusion with reference to this partnership: It appears that Chong did not want Ching in; he particularly, and he finally prevailed upon his brother, Dr. Tong, to leave him out. And immediately [263] when Ching heard about this, up at Hiram Fong's office, he telephoned Dr. Tong on Maui, and immediately went over to see him and borrowed money

from somebody—borrowed \$75 from somebody, and went to Maui to see about it. In other words, it would appear from his action that he was greatly surprised and chagrined that he was not within the partnership.

Dr. Tong testifies that he was trying to get him to finance it; that is, he, Dr. Tong, to finance Ching. In Ching's testimony he says that he could have borrowed one thousand dollars on land, on his house, and then he provides evidence—he produces some other witnesses here who testified he was agreeable to loaning him \$3,000 without security, and that he had been ready, able and willing at all times to put it up. Ching gives the reason for not having paid the \$3,000, saying that Chong was the person who was making the financial arrangements and had never made any demand upon him.

Well, this Court believes that at the time that this partnership was actually consummated it really amounted to a squeeze-out of Ching, and at that time there is no question in this Court's mind that had Ching proceeded to claim or demand his share that he would unquestionably be entitled to obtain it. He says that he did not want to go into court; that he trusted these gentlemen, and at the time I believe there was testimony to the effect that Dr. Tong told him that he could go into partnership with him in some other business. At any rate, from the time this partnership—or the trip to Maui, around the 12th, we will [264] say, of October, up until December 7th, the day of the blitz, he did

nothing. Well, that is a period of seven weeks. Well, the blitz came along, and of course, as we all know, the bars were closed for a period—the testimony is here, four or five months, and of course they were losing money, not selling anything and still had to pay their rent, and possibly some of their help. Well, Ching, of course, at that particular time, he would not be very interested in putting in money and also at that particular time we were pretty well upset around here, and you could not do very much of anything anyway.

Then there was a lifting of the ban upon the bars, and during the war days it is a matter of common knowledge that the streets of Honolulu were literally swarming with service men and defense workers, and that every bar in town, of which there were a great many, they had a bouncer at the bar to let people in and let people out, and lots of them had to have a chain across the door to help them do that, and practically every bar in town by mid-morning had a line of from 10 to 75, maybe, of service men waiting their turn to get into a bar. A bar was a gold mine, no question about that.

Now that period, we will say from the middle of 1942 and all of 1943, to January the 6th, 1944, when there was a letter written, a demand—and he has also testified in late 1943, which appears to be in all likelihood correct, Mr. Ching went to see Mr. Herbert Lee about his interest in this partnership, and since that time this case was in the courts, and just now coming to trial. [265]

Now with reference to the defense of the statute

of frauds, or with reference to the signing of the lease, the Court does not think anything of that defense at all, because all of the interested parties, including the lessee, the then lessee, Long John and his wife Elsie—were all of the belief and felt that Ching was a member of this partnership. And the partnership has a lease, and they can—you don't have to—in order to change your partners, you don't have to do anything particular about the lease, the new member of the partnership goes on the lease; you either add or subtract the name.

The real question here in this case is whether or not the conduct of Ching in not attempting to seek legal redress before the time he did was laches on his part. Now that is what it amounts to. The Court feels that under the situation, under the conditions that there were at that time, taking everything into consideration, the relationship of the parties and the various positions the persons held, the Court will not consider this as laches, and will order an accounting.

Mr. Waddoups: Then, if your Honor please, we make an application at this time for the privilege of taking an interlocutory appeal to the Court's finding on the subject of the factual situation.

Mr. Lee: I think it is within the discretion of the Court to allow an interlocutory appeal, so I understand it, but it seems to me it would be better for the Supreme Court to have the whole record before them, instead of making the two appeals.

The Court: Well, the accounting is a pretty

long, [266] drawn-out affair, and possibly the record is fairly brief, without the accounting, and the Court is inclined to allow counsel or permit an interlocutory appeal. Possibly it would obviate the necessity, if his contention is correct, of the expenses of an accounting, which the Courts in a case of this kind, where it extends over a period of years, the courts often avoid, if possible, checking over a tremendous amount of figures, and they have to appoint a master to check these figures, and if the Court is right the master takes it on.

Case Closed

I Hereby Certify the above and foregoing, pages 261 to 267, to be a full, true and correct transcript of my shorthand notes taken at the time and place therein stated of the matter herein transcribed.

Honolulu, T. H., July 6, 1948.

/s/ R. N. LINN,

Official Reporter.

[Endorsed]: Filed October 12, 1948.

[Title of Court and Cause.]

SUPREME COURT CLERK'S CERTIFICATE

I, Leoti V. Krone, clerk of the supreme court of the Territory of Hawaii, do hereby certify that the foregoing documents listed in the index hereto attached are full, true and correct copies of the certified copies and of the originals on file in the above-entitled court and cause. I further certify that the transcript of testimony, No. 1077, is a certified copy in accordance with the certificate of the reporters, filed in said court and cause. I further certify that all documents and items listed in said index are attached hereto.

I further certify that the cost of the foregoing transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit is \$122.00, and that the said amount has been paid by the attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the supreme court of the Territory of Hawaii, at Honolulu, this 19th day of December, 1950.

MRS. LEOTI V. KRONE,
Clerk.

[Endorsed]: No. 12784. United States Court of Appeals for the Ninth Circuit. Hung Chin Ching, Appellant, vs. Fook Hing Tong, Chong Hing Tenn and Kui Hing Tenn, Appellees. Transcript of Record. Appeal from the Supreme Court for the Territory of Hawaii.

Filed December 22, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 12,784

IN THE

United States Court of Appeals
For the Ninth Circuit

HUNG CHIN CHING,

Appellant,

vs.

FOOK HING TONG, CHONG HING TENN
and KUI HING TENN,

Appellees.

Upon Appeal from the Supreme Court of Hawaii.

OPENING BRIEF FOR HUNG CHIN CHING, APPELLANT.

SHIRO KASHIWA,

307 Hawaiian Trust Building, Honolulu 13, T. H.,

Attorney for Hung Chin Ching,
Appellant.

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No. 12,784

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HUNG CHIN CHING,

Appellant,

vs.

FOOK HING TONG, CHONG HING TENN
and KUI HING TENN,

Appellees.

Upon Appeal from the Supreme Court of Hawaii.

OPENING BRIEF FOR HUNG CHIN CHING, APPELLANT.

JURISDICTIONAL STATEMENT.

This is an action in equity brought by the Appellant against the Appellees in the Circuit Court for the First Judicial Circuit of the Territory of Hawaii for an accounting of the profits of a certain partnership, to declare a trust and to establish a lien on the partnership assets, and other equitable relief arising out of the same transaction, filed April 5, 1944. (Tr. pp. 3-18.)

After several demurrers and amended bills, a demurrer to the Fourth Amended Bill was overruled and an answer was filed on June 16, 1948 by the

Appellees denying all the material facts alleged. (Tr. pp. 18-20.)

A trial was had thereafter and a decision handed down by the trial judge on August 25, 1948 ordering a decree in favor of the Appellees and against the Appellant. (Tr. pp. 43-48.) A decree was so filed on September 2, 1948. (Tr. pp. 49-50.)

The Appellant appealed from this decree on September 9, 1948 to the Supreme Court of the Territory of Hawaii. (Tr. p. 50.) The trial Court's decision was affirmed by the Supreme Court of Hawaii in an opinion handed down on August 18, 1950. (Tr. pp. 53-69.) The decision on appeal was filed on September 12, 1950. (Tr. pp. 77-80.)

On November 22, 1950, Appellant filed a notice of intention of appeal and a motion for order withholding mandate to the Circuit Court of the First Judicial Circuit, Territory of Hawaii (trial Court). (Tr. pp. 81-82.) An order was issued therefrom staying mandate on November 22, 1950. (Tr. p. 83.)

With the leave of the Supreme Court of Hawaii, affidavit of the Appellant was filed on December 1, 1950, to clarify the amount involved in this case as being more than the \$5,000.00 minimum jurisdictional amount required. (Tr. pp. 83-86.)

The papers necessary for the completion of the appeal were filed on December 6, 1950, and the record on appeal from the Clerk of the Territorial Supreme Court was sent to this Court in adequate time. (Tr. pp. 89-104.)

The United States Court of Appeals for the Ninth Circuit has jurisdiction upon appeal from the decision of the Supreme Court of the Territory of Hawaii by authority of Sections 1293 and 1294 (5), Title 28, U.S.C.A.

STATEMENT OF THE CASE.

This is an action in equity. The bill in the present action involves the "Green Mill," a licensed liquor dispensing establishment and a restaurant in Honolulu. It is entitled "A Bill to Declare Trust and Lien, for an Accounting, for Receiver and for Money Judgment." (Tr. pp. 3-13.)

The Appellees, who are all brothers, and the Appellant met one evening in September, 1941 at the home of the Appellees' father in Honolulu. (Tr. pp. 108-112, 171.) They had heard that the "Green Mill" aforementioned was for sale. (Tr. p. 154.) It was decided at the said meeting that they, the Appellant and Appellees, all four were to purchase the said "Green Mill." (Tr. p. 284.) The Appellant and Appellees together went to the home of one Lum Kam Hoo, the proprietor of said Green Mill, to negotiate a purchase of the Green Mill. (Tr. p. 284.) The Appellant and the Appellees agreed to purchase and Lum Kam Hoo agreed to sell the business for the price of "\$25,000 plus inventory" (Tr. p. 111) and the purchasers then and there offered said Lum Kam Hoo a token down payment. (Tr. pp. 157, 273.) The payment was refused as being unnecessary and the

Appellant and Appellees were instructed to see Hiram Fong, an attorney, for the necessary papers to complete the sale. (Tr. p. 274.) It was further agreed by the Appellant and Appellees with Lum Kam Hoo that there would be a period when the purchasers would learn to operate the business from the vendor. (Tr. pp. 167-168.) The facts up to this point are not in dispute. With relation to the agreement to purchase the trial Court found:

“Upon learning that Ching was acquainted with Lum, co-owner, with his wife, of the Green Mill, they all went to Lum’s home. After some discussion Lum agreed to sell for \$25,000.00 plus the inventory and the Tenn brothers and Ching agreed to buy the Green Mill. A tender of a \$200.00 check to bind the agreement was refused by Lum who advised the parties that his attorney, Hiram Fong, would take care of all the details of the sale and transfer of the business, which included an assignment of a lease, the transfer of the liquor license, and an inventory of the stock on hand. Lum further agreed to allow the prospective purchasers to operate the Green Mill while the transfer was being made.” (Tr. pp. 44-45.)

The Appellees and the Appellant agreed among themselves in anticipation of the purchase and operation of the Green Mill the shares of the parties and the division of labor. Among other things it was decided that Appellant’s share of the purchase price was \$3,000.00 and the Appellees were to raise the balance. It was further agreed that Chong Hing Tenn, one of the Appellees, was to take care of the finances

and legal matters, and that the Appellant was to take care of the sales and personnel. (Tr. pp. 240, 286.) As for the foregoing facts, again there is not much dispute. The trial Court found as follows:

“It was agreed between the parties that upon the formation of the partnership that the active members would be Ching, who would be in charge of the personnel and management of the business, and Chong Hing Tenn who would take care of the finances and any legal matters.” (Tr. p. 45.)

From about September 15, 1941 the Appellant and one of the Appellees, Chong Hing Tenn, aided in the operation of the business to learn the business. (Tr. p. 294.) After October 1, the operation was that of the purchasers. (Tr. p. 168.) Appellant was in charge of the personnel and management and Appellee, Chong Hing Tenn, took care of the finances and legal matters. (Tr. pp. 295-297.) Appellant rendered services to about October 20, 1941. (Tr. p. 299.)

Hiram Fong acted as attorney for the sellers of the Green Mill as well as for the purchasers. (Tr. p. 330.) He understood that Appellant was one of the purchasers. (Tr. p. 331.) Chong Hing Tenn, one of the Appellees, gave him most of the instructions. (Tr. p. 338.)

As a result of the operation of the business during the trial period, Appellees learned that the business was a “gold mine.” (Tr. pp. 129 and 346.) Appellee Dr. Tong’s share from the business for the first three months was \$2,000. Chong Hing Tenn, who took care of the financial matters for the purchasers, prohibited

Appellant from looking at the total sales amounts in the cash register. (Tr. pp. 306 and 314.) The business was good and sales amounted to about \$600.00 per day. (Tr. p. 306.)

On or about October 6, 1941 one of the Appellees, Dr. Tong, wrote to the Appellant stressing the confidence he had in Appellant and ordering him to run the business in a certain manner. (Tr. pp. 130-132.) On the same date Appellee, Dr. Tong, also wrote to his brother Chong Hing Tenn ordering him to run the business in a certain way. (Tr. pp. 133-135.) The letters were written from Wailuku, Maui, an island several hundred miles away from Oahu where Honolulu is situated. Dr. Tong was then in the army. (Tr. p. 107.) On the same day, October 6, 1941, Attorney Hiram Fong wrote to the liquor commission that the liquor license be transferred to Appellee, Chong Hing Tenn, only; this was changed a few days later and on October 10, 1941 the transfer of the liquor license to the three Appellees was approved. (Tr. pp. 203 and 205.) On October 10, 1941, a bill of sale of the business (Pet. Ex. J, Tr. pp. 248-249) was executed; it was to the Appellees only. Attorney Hiram Fong stated that the minds of the seller and purchasers met as of that day and considered October 10, 1941 as the date of the consummation of the sale. (Tr. p. 337.) The Appellees had in their possession a bill of sale to Appellees only dated October 20, 1941. (Pet. Ex. C, Tr. pp. 161-163.)

After writing the aforementioned friendly letter to the Appellant on October 6, 1941, and while Appellee, Chong Hing Tenn, was maneuvering the transfer,

Dr. Tong on October 9, 1941 wrote to the Appellant to get out and vacate. (Tr. p. 366.)

The total value of the inventory was \$10,046.25 (Tr. p. 224), making the total price \$35,046.25. A total of \$25,000.00 cash was put up by the Appellees (Tr. pp. 374-377) and it was paid on the dates hereinafter indicated to the owners of the Green Mill. To meet the balance of the \$10,046.25 a promissory note secured by a chattel mortgage was executed. (Tr. p. 224). The bank records showed that the Appellees raised \$25,000.00 by September 30, 1941, paid out \$15,000.00 on September 30, 1941, and \$10,000.00 on October 9, 1941. (Respondents' Ex. No. 2, Tr. p. 374.)

On October 14, 1941 the three Appellees only signed their formal partnership papers. (Tr. pp. 206-207 and pp. 146-149.)

The lease to the business premises was assigned to the Appellees only on October 30, 1941. (Pet. Ex. G, Tr. pp. 232-233.)

The events which occurred from the time the agreement to purchase was entered to October 20, 1941 are chronologically listed in Argument I of this brief.

Appellant testified that he had \$3000.00 available to him by way of a \$2,000.00 loan from witness K. C. Wong and \$1,000.00 by way of a second mortgage on Appellant's home. (Tr. p. 304.) K. C. Wong's testimony that he was willing to lend Appellant \$2,000.00 is unimpeached. (Tr. pp. 191-193.) Appellant testified that he understood that Chong Hing Tenn was in charge of finances and that Chong Hing Tenn was to make demand on Appellant when the

money was needed to consummate the deal but no such demand whatsoever was made. (Tr. p. 303.)

When he first discovered that the sale was made to the Appellees only and that he was not in the partnership, he immediately made a radiophone call to Dr. Tong on Maui. (Tr. p. 299.) The fact that the phone call was made is substantiated by Attorney Hiram Fong's testimony. (Tr. p. 328.)

No legal action was taken immediately because war started on December 7, 1941 and martial law was declared and Appellant believed that there was nothing he could do about it in the courts. (Tr. p. 310.) He saw his attorney in November of 1943. (Tr. p. 312.)

Appellant was represented by Herbert K. H. Lee and David R. Castleman, Jr., in the trial Court and Supreme Court of Hawaii. They both withdrew after the Supreme Court decision (Tr. p. 69) and Appellant is now represented by counsel of record in this Court.

The foregoing is a brief summary of the evidence presented in the trial Court.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Hawaii erred in sustaining the decision and decree of the trial Court.

2. The Supreme Court of Hawaii erred in holding that there was no constructive trust relationship by and between the Respondents-Appellees and the Peti-

tioner-Appellant after the former acquired title to the restaurant business.

3. The Supreme Court of Hawaii erred in holding that there was no partnership relationship existing in spite of the fact that the restaurant business was launched and in active operation from and after October 1, 1941.

4. The Supreme Court of Hawaii erred in holding that the Petitioner-Appellant had no suit for an accounting when he already performed services and had a vested interest in the partnership.

5. That the Supreme Court of Hawaii erred in completely disregarding the fact finding of the trial Court that the Petitioner-Appellant was "squeezed out" by the Respondents-Appellees.

6. The Supreme Court of Hawaii erred in completely disregarding the oral decision of the trial Court which was perfectly consistent with the written decision; that the said oral decision amounted to a finding of fraud practiced by the Respondents-Appellees against the Petitioner-Appellant.

7. The Supreme Court of Hawaii erred in not overruling the trial Court's finding and conclusion that the partnership was never formed and that it was a mere agreement to form a partnership when the evidence showed that there was an actual partnership in operation.

8. The Supreme Court of Hawaii erred in holding for the Respondents-Appellees even though it failed to find that a demand was made by the Respondents-Appellees upon the Petitioner-Appellant.

9. The Supreme Court of Hawaii erred in concluding that from the evidence adduced there was no showing of a partnership.

10. The Supreme Court of Hawaii erred in sustaining the fact findings of the trial Court in so far as they were adopted by the said Supreme Court.

11. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) "The record bears no recession or cancellation of the original agreement which entitled the petitioner to participate *in the purchase conditioned upon the payment of his contributive share of \$3,000, by any or all of the respondents, or by the petitioner himself.*" (Objectionable portion emphasized.)

12. That the Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) "Under the oral agreement with the seller *fixing the time of payment of the purchase price as October 1, 1941, a limitation of time for performance by the petitioner, during which he was to tender his contributive share, was fixed and agreed upon.*" (Objectionable portion emphasized.)

13. That the Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) "In addition to the fact that the experimental period of operation by the party purchasers was to terminate on October 1, 1941, *during which period the petitioner had ample opportunity to tender*

his contributive share, the evidence further discloses that the sale, by way of execution of all requisite documents and transfers, was not consummated until October 20, 1941, retroactive to October 1, 1941. The petitioner was, by operation of time and with the acquiescence of the respondents, gratuitously accorded an extra period of dispensation in which to tender his contributive share. During this twenty-day period of additional concession, the petitioner failed to perform, and has not, in our opinion and as found by the trial judge, established any valid reason for his default.” (Objectable portion emphasized.)

14. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) “The letter of October 6, 1941, from Fook Hing Tong to the petitioner, fourteen days prior to the actual consummation of the sale contains an affirmance that the original agreement between all party purchasers, including the petitioner, was still in effect, though the trial period and *the due date of the purchase price on October 1, 1941, expired six days prior thereto. The period within which the petitioner could have tendered his contributive share was thereby extended to October 20, 1941. Of this extension of time in which to perform, the petitioner was also given notice.*” (Objectable portion emphasized.)

15. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in this case:

(a) *“The purchase price was payable by the party purchasers on October 1, 1941. The petitioner, as a party to that oral agreement, was aware of and so bound, as were all the party purchasers, by this due date of payment.”* (Objectionable portion emphasized.)

16. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) *“The record further discloses that petitioner’s right of contribution was expressly conditioned upon tender of his contributive shares as agreed upon. This he failed to do.”* (Objectionable portion emphasized.)

17. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) *“The respondent’s upon petitioner’s default, contributed the sum of \$25,000, which was paid to the sellers as the purchase price of the business as agreed upon. They thereupon formed and registered a co-partnership between themselves excluding the petitioner, to the end that they, as the remaining party purchasers, would be qualified to render continuity to the operation of the business in conformance with the attending legal requisites. The petitioner failed to tender his contributive share to the enterprises and has given no valid excuse for failing to do so, and was thereby precluded from participating therein as a result of this failure. He has further failed, in this court’s opinion upon review of the records, to establish his asserted right to be presently included as a*

member of the copartnership formed on October 20, 1941, retroactive to October 1, 1941.” (Objectionable portion emphasized.)

18. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) “*The respondents, on the contrary, violated no confidence the petitioner reposed in them, violated no oral agreement entered into between the original party purchasers, displayed no bad faith, nor practiced or perpetrated fraud upon the petitioner in respect of his exclusion from membership in the registered copartnership. They elected to adhere to their original agreement as party purchasers and pursuant thereto contributed their respective shares as agreed upon. They further acquiesced in and accorded the petitioner the extended period of grace above referred to during which time he also failed to perform. He admittedly defaulted.*” (Objectionable portion emphasized.)

19. The Supreme Court of Hawaii erred in making the following fact findings and conclusions upon the evidence adduced in the case:

(a) “*Upon the entire record on review, whether or not the original oral agreement between the parties to the proceeding constituted a copartnership or joint adventure binding them with the legal incidents flowing therefrom, is not pertinent to the disposition of the issues of facts presented which are determinative of the sole question presented on appeal.*” (Objectionable portion emphasized.)

20. The Supreme Court of Hawaii erred in affirming the following fact finding of the trial Court:

(a) "The respondent Fook Hing Tong then being on the island of Maui, replied to both the petitioner and respondent Chong Hing Tenn on October 6, 1941, and expressly reaffirmed the oral agreement among the party purchasers and reassured the petitioner *that he was to share in the business to the extent of a three-share interest upon the express condition that he make contribution of the amount representing his three-share interest as agreed upon.*" (Objectionable portion emphasized.)

SUMMARY OF ARGUMENT.

1. The Supreme Court of Hawaii erred in holding that the evidence adduced was not sufficient to warrant a finding and conclusion that the Appellees held the title to the Green Mill in constructive trust in favor of the Appellant for Appellant's proportionate share. This argument covers Specification of Errors 2 and 4.

2. The Supreme Court of Hawaii erred in holding that the evidence presented was not sufficient to hold that a partnership existed. This argument covers Specification of Errors 2, 7, 8, 9 and 10.

3. The Supreme Court of Hawaii erred in completely disregarding the interlocutory oral decision and the fact findings made therein by the trial Court. This argument covers Specification of Errors 5 and 4.

4. The Supreme Court of Hawaii erred in holding that tender was necessary under the circumstances and that the Appellant defaulted in making said tender. This argument covers Specification of Errors 8, 11, 12, 13, 14, 15, 16, 17, 18 and 20.

5. The Supreme Court of Hawaii erred in making certain fact findings and conclusions. The particular fact findings and conclusions are referred to in the argument. This argument covers Specification of Errors 11, 12, 13, 14, 15 and 16.

6. The Supreme Court of Hawaii erred in holding that it was not necessary to rule as to whether there was an existing partnership or not. This argument covers Specification of Error 19.

Specification of Error 1 is of a general nature and the entire argument is in support of said specification.

ARGUMENT.

I.

THE SUPREME COURT OF HAWAII ERRED IN HOLDING THAT THERE WAS NO CONSTRUCTIVE TRUST RELATIONSHIP BY AND BETWEEN THE RESPONDENTS-APPELLEES AND THE PETITIONER-APPELLANT.

The trial Court, from the evidence with relation to the negotiations to purchase the "Green Mill," found as follows:

"Upon learning that Ching was acquainted with Lum, co-owner, with his wife, of the Green Mill, they all went to Lum's home. *After some discussion Lum agreed to sell for \$25,000.00 plus the*

*inventory and the Tenn brothers and Ching agreed to buy the Green Mill * * **” (Emphasis ours.) (Tr. p. 44.)

The trial Court further found:

“The agreement upon which this action is based, was one to form a partnership.” (Emphasis ours.) (Tr. p. 48.)

The foregoing emphasized findings were not reversed by the Supreme Court of Hawaii in its decision. (Tr. pp. 53-67.) The Supreme Court of Hawaii and the trial Court in rendering their respective decisions stepped out on the wrong foot because both were led to believe that since there was no partnership but a bare agreement to form a partnership, the usual rule of fiduciary relationship between partners was not applicable. It is submitted that the rule of fiduciary relationship between partners applies not only when there is a partnership but also when there is an agreement to form a partnership. The rule is well stated in 40 *Am. Jur.* 217, paragraph 128:

*“The relationship of partners is fiduciary and imposes upon them the obligation of utmost good faith and integrity in their dealings with one another with respect to partnership affairs. * * **”

*“The duty of good faith exists also between persons who are about to become partners, and between those who have been partners and who are still engaged in the process of winding up the firm affairs * * **” (Emphasis ours.)

In *Zogg v. Hedges*, 126 W.Va. 523, 29 S.E. (2d) 871, the Court held, on page 527:

“* * * They plainly base their bill on the universal rule that partners must deal with each other openly and in the utmost good faith. This principle of common honesty covers not only transactions after the partnership is established but *those taking place during negotiations toward partnership.*” (Emphasis ours.)

In the oft-cited case of *Densmore Oil Co. v. Densmore* (1870), 64 Pa. State Reports 43, the Court held:

“* * * It is a familiar principle of the law of partnership, one partner cannot buy and sell to the partnership at a profit; nor, *if a partnership is in contemplation merely*, can he purchase with a view to a future sale without accounting for the profit.” (Emphasis ours.)

See, also:

Kimberly v. Arms, 129 U.S. 512, 52 L. Ed. 764, 9 S. Ct. 355;

Wetzel v. Jones, 75 W.Va. 271, 84 S.E. 951;

Fouse v. Shelly, 64 W.Va. 425, 63 S.E. 208;

Engeman v. Taylor, 46 W.Va. 669, 33 S.E. 922;

Kroll v. Coach, 45 Or. 459, 78 P. 397.

The Supreme Court of Hawaii and the trial Court did not even discuss the rule of fiduciary relationship between partners or persons who are about to become partners. Both Courts below considered Appellant and Appellees as strangers and no “extra duties” of persons in fiduciary relationship were imposed on the Appellees. Although a transaction between strangers

may not be questioned, once fiduciary relationship is established the same transaction may be impeached because of such relationship. In *Hall v. Wynam*, 14 Hawaii 306, at page 310, it is stated:

“* * * ‘Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached if no such confidential relation had existed.*’ ” (Emphasis ours.)

In 40 *Am. Jur.* 217, paragraph 128, the fiduciary relationship among partners is well defined:

“The relationship of partners is fiduciary and imposes upon them the obligation of the utmost good faith and integrity in their dealings with one another with respect to partnership affairs. Hence, partners must refrain from making any false representations to each other. And where, in transactions connected with the partnership business, one partner obtains an undue advantage over a copartner by false representations, equity will grant relief to the defrauded party.

“The objection of good faith imposes upon the partners more than a duty to refrain from making false representations to each other. The partners must not deceive one another by concealment of material facts. *Since each is the confidential agent of the other, each has a right to know all*

that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs. Under statutory provision in most jurisdictions, partners must render on demand true and full information of all things affecting the partnership to any partner or partners or the legal representative or any deceased partner or partners under legal disability.

“The duty of good faith exists also between persons who are about to become partners, and between those who have been partners and who are still engaged in the process of winding up the firm affairs. *It involves also the obligation on each partner in acting for the partnership to consult his copartner in every important exigency in the partnership affairs, in the absence of special circumstances excusing him from so doing.*” (Emphasis ours.)

See, also:

Brooks v. Martin, 2 Wall. 70, 17 L. Ed. 732;

Patrick v. Bowman, 149 U.S. 411, 37 L. Ed. 790, 13 S.Ct. 811;

Goldsmith v. Koopmen (C.C.A. 2), 152 F. 173;

Whitney v. Dewey (C.C.A. 9), 158 F. 385.

The fact that there were strained relationships between one of the Appellees, Chong Hing Tenn, and the Appellant did not diminish the fiduciary relationship. It is stated in 40 *Am. Jur.* 219, paragraph 130, as follows:

“The duty or obligation of partners to act with the utmost candor and good faith in their dealings as between themselves is not to be lessened

by the fact that during negotiations for the purchase of one partner's share by another the relations between them became strained, for the obligation remains until the relation is terminated. Thus, the mere fact that strained relations had grown up between the partners, and that a suit for an accounting and dissolution, filed by the partner who later bought his copartner's interest, had been pending for some time prior to such purchase, did not relieve the purchasing partner of his duties as a fiduciary, or justify him, even in the absence of conscious fraud, in dealing with his copartner as a stranger."

See, also:

Arnold v. Maxwell, 223 Mass. 47, 111 N.E. 687;

Lindquist v. Peterson, 134 Minn. 279, 158 N.W. 426;

Wright v. Duke, 91 Hun. 409, 36 N.Y.S. 853;

Johnson v. Peckham, 132 Tex. 148, 120 S.W. (2d) 786, 120 A.L.R. 720.

The trial Court in its decision found that:

"It was agreed between the parties that upon the formation of the partnership that the active members would be Ching, who would be in charge of the personnel and management of the business, and Chong Hing Tenn would take care of the finances and any legal matter." (Tr. p. 45.)

The foregoing findings are repeated in the Supreme Court decision and said findings remained undisturbed. (Tr. p. 61.) In other words, Appellee, Chong Hing Tenn, was to take care of the legal matters of the proposed partnership. He thus became an agent

for such purpose for the Appellant and the two remaining Appellees. Clothed with the fiduciary duties above indicated, he was charged with a duty to carry out his duties in good faith.

In *Kroll v. Coach*, 45 Or. 458, 78 P. 397, at 399, the Supreme Court of Oregon in deciding a case involving joint adventurers, wherein the plaintiffs and defendant were joint purchasers of land, stated:

“In the legal aspect of the case, the defendant assumed a relation of trust and confidence toward plaintiffs. His position was such that he had exclusive knowledge of subsisting conditions affecting the venture that he proposed, and the plaintiffs were dependent entirely upon his representations, and relied upon them. In effect, he acted as their agent, as well as for himself, in negotiating and consummating the purchase from the original holders of the land to which they subsequently acquired the title in their own right. Such a relation enjoined upon the defendant absolute good faith toward the plaintiffs, and he was in duty bound, in law as well as in ethics, to disclose to his principals all the knowledge attending the transaction that he possessed. If he had been dealing with them at arm’s length, as his theory of the case would imply—that is, if he had been selling to them, instead of buying for them—the duty would have been otherwise. But he was not. He occupied the position of negotiating a joint purchase for the three, including the plaintiffs and himself, and plaintiffs were entitled to all the advantages jointly with him that he contracted for under his option with the original holders. * * *

“* * * Agency is a fiduciary relation, which is one of trust and confidence, and ‘the same observations apply,’ says Mr. Perry in work on Trusts (vol. 1 (4th Ed.) section 206), ‘as to other relations of trust and confidence.’ He further observes: ‘No person whose duty to another is inconsistent with taking an absolute title to himself will be permitted to purchase for himself, for no one can hold a benefit acquired by fraud or a breach of his duty. All the knowledge of the agent belongs to the principal for whom he acts, and, if the agent use it for his own benefit, he will become a trustee for his principal.’ With reference to the same subject Mr. Beach says: ‘This is a fiduciary relation, and the principles of equity by which the relations of a trustee to his beneficiary is governed apply to the relation of an agent to his principal. It is well settled that any person sustaining a fiduciary relation toward another in regard to property is bound to make use of all the knowledge, to improve all the opportunities, to exercise all the powers and rights of every description that he has derived from his fiduciary position, or has acquired by means of it, for the benefit of his cestui que trust. And on the same principle he may not avail himself of these advantages to promote his own interest. The rule is inflexible that in every case in which a person is either actively or constructively an agent for others, all the profits and emoluments secured by him in the business inure to the benefit of the employer.’ 1 Beach, Trusts & Trustees, section 192 * * *”

It is respectfully submitted that Chong Hing Tenn's actions show that he breached every fiduciary

duty imposed on him. In the first place, the same attorney, Hiram Fong, who represented the Appellees in a letter addressed to the Liquor Commission on October 6, 1941 requested the transfer to Appellee, Chong Hing Tenn, only. (Tr. p. 202.) The secretary of the Liquor Commission later wrote in the names of the two other Appellees, Doctor Fook Hing Tong and Kui Hing Tenn. (Tr. p. 203.) A few days before October 9, 1941 (Tr. p. 203), but after the above-mentioned October 6th letter was received (Tr. p. 204), Liquor Inspector Henry N. Thompson investigated the case and on October 9, 1941 made his report (Tr. p. 203). The following is the report:

“PETITIONER’S EXHIBIT E

Rec’d by Liquor Commission on October 10, 1941.

Inspector’s Report

“By a mutual verbal understanding with a very intimate friend, Mr. Chong Hing Tenn was in partnership with one named James Omura, doing business as the Hai Liquor House, exercising a retail beer and wine, and a dispenser beer and wine licenses, from 1937 to 1939, when the business was sold to John Rochas, in May 1939, for \$650.00. This business was a separate unit from that of the Tong Fat Tenn Store. Since leaving the plantation in 1940 he has been in his father’s store, which he has operated as his own.

“Purchase price is \$25,000.00 cash. *The applicant has \$10,000.00 of his own. His brother, Doctor Fook Hing Tong is advancing \$10,000.00 and another brother, Doctor Kui Hing Tong, \$5,000.00, and are his backers, starting him in*

business. This is a family business affair, and eventually may combine all brothers later.

“There is about 4 years left to the present lease which expires in 1945. Rental now is \$350.00, of which the Metronome Music Store pays \$130.00, being that they have acquired a portion of the original premises.

“This is a bona fide restaurant, that is well patronized during meal hours, and *we believe that Mr. Chong Hing Tenn, will be a satisfactory licensee.* He is an experienced business man, and is to be assisted by Mr. Ching, at present a Sergeant in the Police Department, who will retire therefrom. Although the present licensee and her husband have been conducting this place in a satisfactory manner, we believe the transfer will be an improvement. We recommend that the request to transfer be granted.

Respectfully submitted,

CLAUDE K. MALANI,

Chief Inspector.

/s/ HENRY N. THOMPSON,

Assistant Chief Inspector.”

(Tr. pp. 210-211.) (Emphasis ours.)

Liquor Inspector Henry N. Thompson testified as follows:

“Q. What was the first thing that came to the attention of the liquor commission considering the premises in relation to the transfer of this liquor license to these people from Mr. Lum?

A. The request by Mrs. Lum to transfer the license *to Mr. Chong Hing Tenn.* There is a letter in here dated the 6th of October, 1941.” (Tr. p. 202.)

“Q. Now, as a part of this entire report there is Mr. Milani and your particular inspector’s report. I will ask you to look at this same report. That is taken from your report, excluding the top part, which consists of or contains (92) the personal history of Chong Hing Tenn.

A. It is part of our report.

Q. That is part of your report?

A. Yes.

Mr. Lee. Is there any objection?

Mr. Waddoups. May I ask a question or two about it?

Mr. Lee. Certainly. Go ahead.

Cross-Examination

By Mr. Waddoups. Q. At the time of your report, copies of which I have here, which was dated October 10, 1941, you were addressing yourself to the proposition of Mr. Chong Hing Tenn taking the license individually, were you not, and not of the copartnership?

A. That I don’t remember, how the copartnership came in, but I think it was done by our secretary. I can’t remember back.

Q. But your reports relate only to Chong Hing Tenn?

A. That is right.

Q. That’s correct. But so far as the present licensee is concerned, or the prospective licensee is concerned, on whom you sent in a report, that was addressed solely to Chong Hing Tenn?

A. Yes.

Q. *That did not at the time contemplate a copartnership, is that correct?*

A. No, sir.

Mr. Waddoups. We will object to it, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial, not binding on the other two respondents. It is addressed solely to the individual. We realize that is (93) a court of equity, and the court can sift the equity properly, but we do not want the record to appear that we are waiving any rights we have in that connection.

The Court. I can't very well rule on it unless I know what it is all about. The report will be received in evidence, over counsel's objection, and marked Exhibit E. It is understood that this is a copy from the reports of the liquor commission. I understand that there is no objection on the ground that it is just a copy from their records.

Mr. Waddoups. No. There is no objection on that ground.

The Court. Very well." (Tr. pp. 208-210.)

The foregoing evidence, never explained by Appellee, positively shows that Chong Hing Tenn intended to take the liquor license in his name only, even to the extent of double-crossing his own brothers.

The intent of Appellee, Chong Hing Tenn, to take the business in his name only is further evidenced by Appellee Dr. Fook Hing Tong's letter of October 6, 1941 to Appellant. (Petitioner's Exhibit A, Tr. pp. 130-132.) The following is the statement in the letter:

"So hold the contract and let Hiram Fong (attorney) know that I (Dr. Fook Hing Tong) want my share in that business and not to put his

(Chong Hing Tenn's) name in the whole shee bang * * * Better put it in Black and White and tell Long John to hold out consummating the business." (Identifying insertions ours.) (Long John is the husband of owner of Green Mill.)

In the letter dated October 6, 1941, marked Petitioner's Exhibit B (Tr. pp. 133-135), from Appellee Dr. Fook Hing Tong to Appellee Chong Hing Tenn, it is stated:

"If you think you can handle the place by yourself you can have my intere shares but I cannot afford to spare that much cash for you to promote any business."

In other words, Chong Hing Tenn's attempt to take the place only by himself was known to Appellee Fook Hing Tong as early as October 6, 1941, though Dr. Fook Hing Tong was on Maui.

Attorney Hiram Fong testified that:

"Q. Chong Hing Tenn, he was the one that gave you most of the instructions?

A. Yes." (Tr. p. 338.)

The said attorney further testified:

"Q. These instructions that you had of who the partners were came from Chong Hing Tenn primarily, is that right?

A. Yes." (Tr. p. 342.)

Therefore, Appellee Chong Hing Tenn's first attempt to get the liquor license in his name only, was a direct breach of his fiduciary duties. Evidently he

later changed his mind and had the liquor commission secretary insert the names of his two Appellee brothers. (Tr. p. 203.) In chronological order, the following matters happened which were within Appellee Chong Hing Tenn's knowledge:

September 29, 1941. Dr. Fook Hing Tong and Kui Hing Tenn raised their \$15,000.00. (Tr. p. 374.)

September 30, 1941. Above \$15,000.00 paid to owners of "Green Mill." (Tr. p. 376.)

September 30, 1941. \$10,000.00, sum by Chong Hing Tenn readied and deposited with Kui Hing Tenn. (Tr. p. 374.)

October 6, 1941. Attorney Hiram Fong wrote letter to Liquor Commission to transfer license to Chong Hing Tenn only. (Tr. p. 202.)

October 7 or 8, 1941. Liquor inspectors questioned Chong Hing Tenn about transfer to him only. (Tr. p. 203.)

October 9, 1941. Liquor inspector's report filed. (Tr. p. 203.)

October 9, 1941. \$10,000.00 paid to owners of Green Mill, bank statement. (Tr. p. 374.)

October 10, 1941. Green Mill transferred by duly signed bill of sale. (Tr. p. 248.)

October 10, 1941. Liquor Commission meeting held and transfer to only 3 Appellees approved. (Tr. p. 160.)

October 11, 1941. Liquor Commission wrote to Attorney Hiram Fong, Appellees' attorney, regarding approval of transfer of liquor license on October 10, 1941. (Tr. pp. 159-160.)

October 13, 1941. Territorial Treasurer's Office report of formation of partnership between 3 Appellees signed. (Tr. p. 207.)

October 14, 1941. Partnership agreement signed by 3 Appellees. (Tr. pp. 146-149.)

October 18, 1941. Chattel mortgage to secure \$10,046.25 note to owners of Green Mill was signed. (Tr. pp. 224-227.)

October 20, 1941. Second Bill of Sale signed from owners of Green Mill to 3 Appellees. (Tr. pp. 161-163.)

Appellee Chong Hing Tenn, who was trusted to take care of the legal and business matters, knew all of these things and never informed Appellant of any of these things. Here, again, in not reporting each of these matters to Appellant, Chong Hing Tenn breached his fiduciary duty to the Appellant. Appellant was by law entitled to know each of these material facts leading to the consummation of the deal. There is no question that the above matters were material to the formation of the partnership and Chong Hing Tenn purposely withheld the information. Furthermore, Chong Hing Tenn prohibited the Appellant from looking at the total sales amount on the cash register. (Tr. pp. 306-314.) This very important evidence was never denied. It all points to the fact that Chong Hing Tenn wanted all the business for himself only or else for his family members only.

The Appellant testified (Tr. pp. 303-304) that Chong Hing Tenn never made demand upon him:

“A. I figured what’s the use, if they are going to treat me like that, I am going to let their conscience be their guide. That is the way I felt. They are good friends of mine, honorable gentlemen. Why should they do a thing like that to me? I don’t like to go to court.

Q. In the testimony of Chong Hing Tenn, particularly, he stated that they were waiting for the money from you. Now, what was the understanding?

A. It was agreed that he was supposed to notify me when the tender is ready.

Q. Who?

A. Chong Hing Tenn, the man in charge of the finances. He was in charge of finances.

Q. He was supposed to let you know?

A. Let me know when the thing was about to be consummated.

Q. Then for you to put up the money, is that it?

A. That’s right.

Q. When was that plan agreed to, about?

A. At the first conference at the house.

Q. At the Tenn house?

A. That’s right.

Q. Did Chong Hing Tenn ever ask you for that money?

A. He never asked me for the money.

Q. Did you at all times have that money available?

A. Yes.

Q. Where was that money? How was that to be raised?

A. I was going to mortgage my house on a second mortgage for \$1,000, and borrow \$2,000 from K. C. Wong.

Q. Was K. C. Wong going to let you have it without security?

A. Yes.

Q. Without security?

A. That's right.

Q. Was that true what Mr. Wong said yesterday, or the other day that he loaned you \$75 to go up to Maui to see Doctor Tong?

A. I borrowed \$75 from him.

Q. Was that without security?

A. No security. He give it to me.

Q. Where were you going to get the loan of \$1,000 on a second mortgage?

A. I was going to get a second mortgage from my brother Hung Wai Ching.

Q. He is a realtor?

A. He is a realtor.

Q. Had he agreed to let you have \$1,000 any time? Did he have that money?

A. He had."

And he further testified (Tr. p. 316) as follows:

"Q. I call your attention to a letter written to you and signed "Bear," which is identified as Petitioner's Exhibit A, and I will call your attention particularly to a part of the second paragraph, where it says, 'I have 15 shares and you have three, that is if you can get the dong by then.' What is meant by that expression?

A. He meant by getting the money.

Q. After you received this letter, did you produce any money?

A. I was waiting for Mr. Chong Hing to ask for that money.

Q. You didn't go and say, 'When do you want it,' or anything, you waited for them to call you?

A. I was waiting for the consummation of the deal.

Q. At the time when you received this letter, had you completed your loan so that you could get the necessary \$3,000?

A. I had already made all arrangements, merely signing the check."

The foregoing testimony of lack of demand was not denied by Chong Hing Tenn. His closest explanation may be the following:

"Q. Where did Mr. Ching come into the picture, if he came in at all?

A. I don't know about him. I didn't do business with him.

Q. Did your brother Fook Hing?

A. Maybe he did; not with me." (Testimony of Chong Hing Tenn, Tr. p. 156.)

In other words, by the foregoing testimony Chong Hing Tenn thought that it wasn't necessary and there was no obligation on his part to report any material facts to the Appellant nor make a demand on the Appellant.

Instead of disclosing all of this information, on or about October 20, 1941, Chong Hing Tenn directed a Bill of Sale to the three Appellees only. It is submitted that a stronger case of a breach of fiduciary duty could not have been presented and the trial Court and the Supreme Court erred in holding that there was no constructive trust. It is elementary that one who acquires property in breach of a fiduciary duty holds such property in constructive trust.

Aldrich v. Hassinger, 13 Haw. 138, at p. 149.

II.

THE SUPREME COURT OF HAWAII ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT THE EVIDENCE PRESENTED DID NOT SHOW A PARTNERSHIP.

The trial Court in its written decision held:

“The agreement upon which this action is based, was one to form a partnership. It was never formed * * *” (Tr. p. 48.)

The Supreme Court affirmed said findings:

“Measuring the findings of fact of the trial Judge by affixing the weight attributable to them under the ruling adopted, *supra*, this Court finds that the evidence warranted the findings made.” (Tr. p. 67.)

It is respectfully submitted that both Courts erred in holding that a partnership did not exist under the evidence adduced in the trial Court. The Supreme Court of Hawaii has held, in *Barnes v. Collins*, 16 Haw. 340, at page 342, as follows:

“What constitutes a partnership is a matter of some diversity of opinion, but in general it may be said that, according to what is called the modern doctrines, *a partnership exists where the parties have contracted to share, as common owners or principals, the profits of a business and that whether an agreement creates a partnership or not depends upon the intention of the parties.* But by the intention of the parties is meant, not what they call or consider the relation into which they enter, but what the relation is in legal effect. The parties may expressly agree that there shall be a partnership and yet such agreement will be ineffective if the specific stipulations do not estab-

lish a partnership as matter of law, and on the other hand they may expressly agree that their relation shall not be that of partners and yet it may be such as matter of law. Perhaps there is no single element that will necessarily show as a matter of evidence that a partnership was intended. Even an express agreement that the parties shall share in the profits and losses will not, it is said, necessarily establish a partnership, but such an agreement would be strong presumptive evidence of a partnership, and even an agreement to share in the profits with no agreement as to the losses would be presumptive evidence of a partnership. If the right to share in the profits is merely by way of compensation in lieu of salary or wages for services performed or of interest for money loaned or of rent for land or of compensation for acting as agent and not by virtue of ownership of the profits, there is not a partnership. The natural inference is, in the absence of a contrary showing, that if one has a right to share in the profits it is because he is a co-owner of the profits. If in addition to a right to share in the profits there is also a liability for losses or expenses the case is greatly strengthened, for agents, or servants or loaners of capital not usually liable for losses or expenses. Of course there need be no partnership name, nor need it be stipulated that there shall be a partnership, nor is it necessary that the partners should understand or realize what the legal consequences of their agreement will be. The question is whether that which they have agreed upon constitutes a partnership as a matter of law; that is, did they agree to become co-owners of the profits?" (Emphasis ours.)

In *Bishop v. Everett*, 6 Haw. 157, at page 158, the Supreme Court of Hawaii adopted Story's definition of a copartnership:

“Story defines a copartnership to be a ‘voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of profits between them.’ ”

Therefore, the Hawaiian law on this subject is no different from that in most jurisdictions.

There is no question tht the parties intended a partnership at some time because as above stated the trial Court held that the agreement “was one to form a *partnership*.” (Tr. p. 48.) Therefore, the sole question is whether facts presented a bare agreement to form a partnership or an existing partnership. For better presentation the argument to follow is divided into sections.

A. PARTNERSHIP WAS ‘LAUNCHED’ BY ACTUAL OPERATION OF BUSINESS.

It is respectfully submitted that as of October 1, 1941 the partnership business was launched and the prior agreement to form a partnership matured into an actual partnership.

Assuming for the present, though not admitting, that the original oral agreement was an executory contract to form a partnership in the future, namely, at such time when the Appellant paid the \$3,000, it is our contention that the partnership was formed

regardless of the fact that such condition precedent to the formation was not performed by the Appellant.

A condition precedent to the formation of a partnership may be waived by the interested parties, and after the waiver thereof a partnership may be formed in spite of the nonperformance or the nonhappening of the condition. The effect of such waiver would for all practical purposes cause the agreement to read as though the condition precedent was never in the contract. Walter A. Shumaker in his "Treatise on the Law of Partnership," states in Section 24 at page 78:

"Any act, the performance of which is made a condition precedent to the formation of the partnership, must be performed before a partnership will be held to exist, though of course it is competent for the parties themselves to waive a condition precedent; and *such conditions are waived where the parties actually 'launched' the partnership without waiting for performance.*" (Emphasis ours.)

In 40 *Am. Jur.* 142-143, paragraph 27, it is stated:

"There is a marked distinction between a partnership actually consummated and an agreement to enter into partnership at a future time. * * * On the other hand, it has been held that a partnership relation exists although the conditions of the partnership are not understood alike by all the partners, *when the parties have agreed to become partners and have actually proceeded to carry into execution the joint undertaking or business.*" (Emphasis ours.)

In *First National Bank of Gainsville v. Cody et al.*, 19 S.E. 831, 93 Ga. 127, the parties entered into an

executory contract to form a partnership in the future “when the stock of Palmour & Smith and of Jephth M. Cody is put together, and inventory is fully taken which shall be within the next 20 or 30 days,” the Court held, at page 838, that a partnership was created prior to the happening of the condition precedent:

“As originally contemplated in the contract for a partnership between Palmour and the two Codys, the partnership business was not to begin until two certain stocks of goods had been consolidated, and an inventory of the same taken. The Court charged in effect, that no partnership could exist between these parties until this has been done. There being evidence to sustain the contention of the defendants that, in point of fact, the partnership did commence in advance of the time stipulated in the contract, this charge was erroneous. *It was undoubtedly competent for these parties to begin the transaction of a partnership business before the time at which they intended it should begin when the contract was made.*” (Emphasis ours.)

The evidence showed that there was a misunderstanding of the terms of the agreement entered into by the Appellant and the Appellees. It was not definitely settled by the Appellees and the Appellant just exactly when the money was to be paid by the Appellant. In exactly such a case where there was a misunderstanding by the parties to the agreement as to the terms of the agreement for the formation of a partnership the Vermont Court in *Cook v. Carpenter and Cook*, 34 Vt. 120, stated:

“* * * but, by the default of the defendant Cook, they did not understand the terms of the joint agreement alike. The plaintiff understood that the capital was to be raised wholly by the defendants, while the defendant Carpenter understood it was to be raised in the ordinary way, by all the members of the firm. *It has never been held that when persons agree to become partners, and actually proceed to carry into execution the joint undertaking or business, that the relation of partners does not exist, because the conditions of the partnership are not understood alike by the partners.*” (Emphasis ours.)

In *Cogswell v. Wilson*, 11 Or. 371, 4 Pac. 1130, the Court in a similar situation as in the present case stated:

“The defendant, Wilson admits the execution of this contract, but denied that its terms or conditions have ever been performed, or that any co-partnership was ever formed or established in pursuance of its provisions, and claims that owing to the inability and failure of the said Jones to comply with his part of the agreement, it was mutually abrogated and abandoned by them, that another and different arrangement was made, and a contract entered into between them, in which it was expressly stipulated in writing that when Jones paid him a certain sum—the purchase price of the sheep—then only was he to deliver to Jones one half of his band of sheep and their increase. * * *”

“*If the contract has been made, property and labor contributed, and the partnership business commenced, there is a partnership until legally dissolved.*” (Emphasis ours.)

In *Hartman v. Woehr and Stegmuller*, 18 N.J. 383, the Court stated:

“They deny that he is, or ever was, a partner, on the ground that he has never complied with the partnership agreement, by paying up his share of the capital. The position taken on their part is, that until that is paid up, he is not admitted as a partner. But this agreement was for a partnership to commence immediately, and to continue for five years. The partners each agreed to pay in \$10,000 of the capital, but it was not a condition precedent. The complainant by his deed, paid up at the time of the agreement \$5,667 of his share; and the defendants accepted it, and used and continue to use, the property in the partnership business. *Neither of them paid up his share at that time, but at intervals of weeks or months afterwards. But the business of the partnership—the erecting of the brewery, and manufacture of beer went on; each contributed some capital and labor. The existence of a partnership does not depend upon the fact that each partner, has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced or carried on to any extent, there is a partnership.* In this case, Hartman put in his property, which was taken, and is still used for the business of the firm; he and his property are liable to all debts of the firm, not only to the notes given in his name, but to all debts incurred, both before and since the 31st day of January, 1866; and if the firm is unfortunate and fails, he may be stripped of every dollar he is worth. The defendant had a remedy if he did not comply with his engagement; they could have asked for a dissolution, and paid him back the amount he

put in, and formed a new partnership. But under this agreement, he was a partner for five years, unless the partnership was sooner dissolved.” (Emphasis ours.)

Furthermore, it is submitted that the trial Court found that the original agreement was as follows:

“From the middle of September until about October 20th, 1941, the Green Mill was operated by Ching (Appellant) and Chong Hing, (Appellee). Up to October 1st it was a trial period under the supervision of the Lums and *after that for the new purchasers.*” (Tr. p. 46.) (Emphasis and identifying insertions ours.)

On October 1, Appellant was one of the purchasers because the trial Court found:

“After some discussion Lum agreed to sell for \$25000 plus inventory and the Tenn brothers (Appellees) and Ching (Appellant) agreed to buy the Green Mill.” (Tr. p. 44.) (Identifying insertions ours.)

Since there was no bill of sale as of October 1, 1941, the Appellees were purchasers on said date by virtue of the contract to purchase. Under the contract to purchase the Appellant was just as much a purchaser as the Appellees.

The trial Court further stated:

“It was agreed between the parties that *upon the formation* of the partnership that the active members would be Ching, who would be in charge of the personnel and management of the business, and Chong Hing Tong who would take care of the finances and any legal matters.” * * * (Tr. p. 45.) (Emphasis ours.)

If the agreed terms were as the trial Court found, then by Appellant's taking charge of the personnel and management (Tr. pp. 294-295) the partnership was in existence. Fact findings of the trial Court in this case must be carefully studied because it was a very close case. The trial Court rendered two decisions. See Tr. pp. 43-48 for the written decision and Tr. pp. 393-399 for the oral decision.

Based on the foregoing authorities it is submitted that "Launching" the business put the partnership into operation and existence and furthermore the trial Court's own findings put the partnership into operation.

B. BUSINESS OPERATED ON EQUITABLE TITLE AS OF OCTOBER 1, 1941 AND EVEN AFTER OCTOBER 20, 1941.

This argument is submitted to show that the entire business since its inception on October 1, 1941, and even after October 20, 1941, the date of the Bill of Sale (Tr. p. 161) was based on equitable title and so when an equitable title was obtained on or about September 15, 1941, all of the necessary co-ownership attributes to an existing partnership existed as of September 15, 1941. Both the trial Court and the Supreme Court laid emphasis on the date of the Bill of Sale, October 20, 1941, but as far as co-ownership was concerned even after October 20, 1941, the type of title held by the Appellees was the same as that of September 15, 1941.

The trial Court in its written decision found as follows:

"After some discussion Lum *agreed* to sell for \$25000 plus the inventory and the Tenn brothers

(Appellees) and Ching (Appellant) agreed to buy the Green Mill.” (Tr. p. 44.) (Identifying insertions and emphasis ours.)

The inventory value later turned out to be \$10,-046.25 (Tr. p. 224) so the total purchase price was \$35,046.25. In other words the Appellant assumed a \$35,046.25 liability together with the Appellees. The trial Court’s finding necessarily leads to this conclusion. Such liability may have been enforceable against the Appellant only because it was joint and several. There was a leasehold involved and under Hawaiian law the purchasers may enforce such agreement by way of a suit in specific performance.

Yee Hop v. Young Sak Cho, 25 Haw. 494;

Tong On v. Tai Kee, 11 Haw. 560;

Sakata v. Yoshikawa, 22 Haw. 288.

Therefore upon the trial Court’s own findings the Appellant had an equitable right and property in and to the Green Mill as of about September 15, 1941. When the business was operated by the purchasers as of October 1, 1941, the Appellant was a co-owner because up to the date the Bill of Sale was consummated, the Appellees’ possession was only by virtue of the Contract of Sale. Had it not been for the Contract of Sale the Appellees would not have been in possession on October 1, 1941. In other words the partial equitable ownership of the Appellant made the business possible as of October 1, 1941.

Even after October 20, 1941, the date of the Bill of Sale (Tr. p. 161), the Appellees only had an equitable title because there was a simultaneous chattel mortgage. (Tr. p. 224.) The Appellees’ entire busi-

ness even after the alleged purchase on October 20, 1941 was based on an equitable title so the Appellant's above-mentioned claim of partial equitable title cannot be belittled.

Much was said by the trial Court that Appellant did not pay his \$3,000.00 but when the Appellees themselves got the Bill of Sale, they were \$10,046.25 short. In other words each of the Appellees was at default in the sum of \$3,348.75 in accordance with the original agreement between Appellant and Appellees because the trial Court found as follows:

“A conference was held one evening at the home of the father of the Tenn brothers * * *

At this time it was agreed that Ching's share would be \$3000.00 and the *balance would be paid by the Tenn brothers.*” (Tr. pp. 44-45.) (Emphasis ours.)

The Appellees themselves were not able to raise the balance but prevailed upon Lum to accept the chattel mortgage of \$10,046.25. (Tr. p. 224.)

In other words the co-ownership of the Appellees as of October 20, 1941, the date of the Bill of Sale, was based on a *credit transaction*. Appellant's claim of co-ownership as of September 16, 1941 was admittedly a credit transaction, but Appellees are not in a position to argue that Appellant's interest was by way of credit only because even Appellees' own title as of October 20, 1941 was based on credit.

At this point all of the points regarding fiduciary relationships in argument (I) are repeated to establish that Appellees took equitable title on October 20,

1941 as trustee for the Appellant. Argument (I) definitely establishes co-ownership in the Appellant by way of a constructive trust.

Furthermore a purchaseer who takes title with knowledge of an outstanding agreement of purchase takes title as trustee for the first purchaser. It is stated in 49 *Am. Jur.* 171, paragraph 148, as follows:

“Conflicting Purchasers. It is well settled that one who takes a deed of land with knowledge of an outstanding contract or title takes it subject to such contract or title, and the person who purchases property with notice of a prior agreement by the vendor to convey to another person is *regarded as the trustee of the latter*. Therefore, one purchasing property with notice that the grantor has contracted to convey it to another may be compelled to perform the contract in the same manner and to the same extent as his grantor would have been liable to do had he not transferred the legal title.” (Emphasis ours.)

Therefore it is submitted that if the Appellees by obtaining their equitable title on October 20, 1941 by way of the Bill of Sale initiated their partnership, there is no reason why Appellant's equitable title as of September 15, 1941 was not just as good to initiate the partnership.

C. APPELLANT RENDERED SERVICES AND ACQUIRED INTEREST IN PARTNERSHIP ASSETS.

The fact that Appellant rendered services is not disputed by the Appellees.

The trial Court found that from the “middle of September until about October 20, 1941, the Green

Mill was operated by Ching (Appellant) and Chong Hing". (Tr. p. 46.) One of the factors in determining whether a partnership existed is the contribution of labor or services. Appellant's services were not only promised but it was actually performed. It is not denied by any of the Appellees that Appellant has never been paid for his services. (Tr. p. 306.)

It is submitted that Appellant's rendering of services created an interest in the partnership assets as of October 1, 1941. In 48 *C.J.S.* 836 it is stated:

"Effect of performance. The performance of services by a joint adventurer in accordance with his agreement with associate or associates gives him, not only a vested interest in the profits derived from the successful prosecution of the enterprise * * * but also in the real and personal property embarked therein, as effectually as though he had contributed a part of the capital with which it was purchased * * *". (48 *C.J.S.* 836.)

Such an interest cannot be summarily forfeited. It is stated in 33 *C.J.* 854 as follows:

"After the agreement has been partially executed by the member's payment of a part of the capital *or the performance of services*, his associates cannot forfeit his interest in the enterprise and exclude him from further participation therein merely because of his failure to pay the full amount promised by him, especially *when no demand has been made upon him for contribution and he has not refused to pay his share*; but his interest is held subject to the claim of his associates for any losses which his default may have caused them." (Emphasis ours.)

Therefore the Appellant's rendering of services is a material consideration in deciding whether the agreement was barely executory or an existing partnership.

**D. LETTERS OF OCTOBER 6, 1941 BY DR. FOOK HING TONG
ADMITS AN EXISTING PARTNERSHIP.**

The letter of October 6, 1941 to the Appellant by the Appellee is an admission that the partnership was in operation. The said letter was introduced as petitioner's Exhibit "A". (Tr. pp. 130-132.) He stated in the letter:

"PETITIONER'S EXHIBIT A

Wailuku, Maui, 10/6/41

Hello HC

Received your letter this noon and was glad to hear from you but I am very sorry to hear that my brothers are giving you a hell of a lot of trouble on this damn business. Don't be surprised that I expected that and was very reluctant to let things go as it is. Any way I guess since *I am the heaviest stock holder* and I know that you were instrumental *in getting the business* for us I feel that it would be okeh as long as you were able to take the business and manage it. I know that I wouldnt put 15000 dollars for nothing knowing that it is a gold mine but hell if *you ditch* the place there wont be any of that money that I will ever smell. I know those brothers of mine and that is one reason why I didn't back them up the last time when they wanted the Motorcoach cafe. Now the trouble id up again.

Here is the proposition, as was stated verbally that you handles the personell and that you also

take care of *my interest there*. *I have 15 shares and you have three*, that is if you get the dong by then, Really I am damn sorry this thing came up as I am just tied down here. *I wouldn't buy the place* if you did not have the job of managing the place. Okeh now you tell my brother that you are representing me and if he doesn't like it he can return the 14000 and *I will pull out and if not I will try and buy him out*. So hold the contract and let Hiram Fong know that I want my share in that business and not to put his name in the whole shee bang, I am sorry to hear from of that crap about my brothers but didn't know that it was that bad.

So much HC as I am very busy and am going to write to those fellows a letter and *tell them that I intended for you to handle the business* as I have all the confidence in you and *that I would not have* put the money out if I was to learned that you were not there to handle it. I know for a fact that they do not thoroly know the hoomalimali game, the banana oil stuff. So much. Tell Dee Hing to take his face out of the place or throw him out as he has nothing in there. As for Kui Hing he is a weak sister and I am disappointed in that guy. So you see you are the big cheese there. Please check the cash too with them and keep track of the whole affair: I hereby appoint you to take *charge of my interests there*.

I am going to write him now and tell him to learn the bloody business before he starts to think of something else, or let me have my 15000 thousand back. Better put it in Black and white and tell Long John to hold out consumating the business. Ahola Bear.

(In pencil): Copy of letter that I wrote Chong * * * They got excited when they see plenty of people and dough. Small town guys Ching * * * so be tolerant and patient. Do it for my sake.

/s/ B'' (Emphasis ours.)

The emphasized portions show that Dr. Tong already on October 6, 1941 considered himself as having an interest in the business although his status was the same as the Appellant's. Appellant and Appellees all had an agreement to purchase as of October 6, 1941. He dealt with the agreement to purchase as having created a vested interest. His statement that "I *have* 15 shares and you *have* three" is especially significant because the word "have" is used. The entire tone of the letter unmistakably designates a present (as of October 6, 1941) interest in the business. *In other words Appellant did have 3 shares on October 6, 1941.*

Furthermore the entire tone of the letter is one of telling another how to run a business. If there were no existing partnership on October 6, 1941, where did Dr. Tong get his authority to tell the others as to how the business should be run? Persons who are mere members of an executory contract to form a partnership do not order people as to how business should be run. *He knew that he had a vested interest and there was a going partnership business—* otherwise the entire letter would not have been written. Only a partner in an existing partnership can write a letter as that written by Dr. Tong.

The letter marked Exhibit A-1 (Tr. pp. 133-135) is of the same purport. He distinctly tells his brother

what to do and how to run the business. Here again, he wrote it as an active partner—because one who is a bare member of an executory contract to enter a business would not write such a letter.

E. ALL OTHER ELEMENTS OF PARTNERSHIP EXISTED.

Sharing of Profits—The evidence is undisputed that the parties intended to share profits. The trial Court found “Each was to draw a salary of \$250.00 a month *in addition to their share in the business*”. (Tr. p. 45.) (Emphasis ours.) The later agreement of partnership entered into by the Appellees only clearly shows that a division of profits was originally intended. See Respondents’ Ex. 1. (Tr. p. 147.)

Sharing of Loss—The later agreement of partnership clearly provides for this. (Tr. p. 147.) The parties must have intended this from the beginning.

Control—Appellant himself was allowed to take charge of the personnel and management of the partnership. He did this from about September 15, 1941 to about October 20, 1941. See trial Court’s findings. (Tr. p. 45.)

Community of Interest in Property—The original agreement of purchase entered into on or about September 15th, 1941, which the trial Court found to be an agreement was sufficient to create this. (Tr. p. 44.) See Argument (I).

Capital Contribution—It is stated in 40 *Am. Jur.* 163, paragraph 49:

“The fact that the party rendering services assumes financial or money obligations by agreeing to make capital contribution or to pay ex-

penses, or by furnishing credit, is suggestive of a partnership contract * * * Again these tests are by no means conclusive.”

See Annotation in 137 A.L.R. 47. The trial Court found that Appellant agreed to furnish \$3000.00. In addition Appellant assumed a \$35,046.25 obligation. (Tr. p. 44.)

**F. SUPREME COURT OF HAWAII HAS DECIDED THAT IN A
SIMILAR SITUATION PARTNERSHIP EXISTED.**

The case of *Lathrop v. Wood*, 1 Haw. 121, (also cited as 1 Haw. 71, old edition) decided by the Supreme Court of Hawaii in 1852, though one of the earliest cases in Hawaiian Jurisprudence, is much in point in this present case. The question was whether a certain written agreement constituted a partnership. The following was the agreement:

“ ‘This agreement, made the first day of October, one thousand eight hundred and fifty, between Robert W. Wood, resident of Honolulu of the first part, and A. H. Spencer, now resident of Honolulu, of the second part, witnesseth, that for certain considerations hereinafter mentioned, the party of the first part engages to convey to the party of the second part, on or before the first day of October, 1851, one-half of his interest in a certain leasehold estate situated on East Maui, * * * also one-half of my rights and interests in a tract of land makai of the tract above described amounting to two hundred acres, * * * Also one-half of my interest in a certain other tract of land situated in East Maui under a verbal contract for a warranty deed with Richard Armstrong, in consideration of which contract the

party of the first part has paid to the said Armstrong one thousand dollars. Also one-half my interest in all the personal property, situated in East Maui, consisting of working oxen, cattle, carts and building materials, * * * subject also to a balance of about two thousand dollars which may be found to be due R. Armstrong on account of land purchased by him. And in consideration of the above properties engaged to be conveyed, the party of the second part agrees to pay or cause to be paid to the party of the first part three thousand nine hundred and sixty-two dollars and fifty cents, as follows: Two thousand dollars in thirty days from the date of this instrument * * * one thousand dollars on the first day of January next, * * * and the balance, nine hundred and sixty-two dollars and fifty cents on the first of October, 1851, * * * And the party of the second part further engages to take charge of the above mentioned estate and properties and * * * for the full term of three years from the date of this, and it is further agreed between the parties that in consideration of the above named services, the said A. H. Spencer shall be allowed a suitable house for himself and family * * * allowed a salary of two thousand dollars a year, and the said A. H. Spencer engages that during the above mentioned time he will engage in no other business, trade or speculation, whether pertaining or not to the duties of superintendent on his private account, but shall devote his whole time to the joint interests of both parties, and it is further agreed between the parties that the liabilities upon the above property, viz., two thousand dollars due R. C. Wyllie on his mortgage, also two

thousand dollars or thereabouts, due R. Armstrong, also the rent and current expenses incurred since the first of April last, shall be borne equally by both parties. And it is further agreed that one-half of all the advances made from this date for the erection of buildings, sugar-mills, and all current expenses including salary of the superintendent, and all losses shall be borne equally by both parties, also all profits arising from the business to be divided equally.

And the party of the first part engages to furnish so much capital as may be necessary to erect and put in operation a sugar-mill, and make such other improvements as the interests of the place may require under a judicious and economical administration by the party of the second part, and such amounts as may become due said Wyllie and Armstrong, on account of a mortgage, and land purchased of said Armstrong. And the party of the second part agrees to apply all his interest in the net proceeds of such amounts as may be due from him to the party of the first part on account of the plantation. And it is further agreed that an account current between the parties shall be made out on the first of October, 1851, and that any balance that may then be found to be due to the said party of the first part, shall be secured to him by a mortgage on the interest which said A. H. Spencer may have in the estate which is to be conveyed as above set forth.

R. W. Wood,
A. H. Spencer.' "

The Court held with relation to this agreement that from the date of the signing of the agreement Spencer became a partner in the enterprise. The Court stated, at pages 125-127, as follows:

“The first question is, what is the nature of this agreement. Is it a contract of copartnership between the parties, or is it as the complainant contends, a mere executory contract for the conveyance of one-half of the East Maui plantation on the payment of the three notes? In the construction of all agreements, the only proper rule is to seek for the intention of the parties. However inartificial or untechnical the manner in which the instrument is drawn up, equity will give effect to the real intentions of the parties, as gathered from the objects of the instrument and the circumstances of the case. I have read this instrument with much care, and, in my opinion, it was the evident intention of the parties to create a partnership, and I cannot see how the instrument can bear any other fair interpretation. The parties to it were to become joint and equal owners of the capital stock of the business, the lands, oxen, cattle, carts, building materials and other personal property. Spencer was to take charge of the plantation and superintend the erection of the mills, buildings, and other works necessary for the prosecution of the business and to ‘devote his whole time to the joint interests of both parties’. In other words, Spencer was to be the working partner, and for his exclusive devotion to the joint interests of the concern, he was to have a suitable house for himself and family, certain rights of pasturage and a salary of two thousand dollars. The liabilities upon the prop-

erty, namely, the mortgage of Mr. Wyllie, the debt of Mr. Armstrong, the rents due, and the current expenses from the 1st day of April, 1850, were to be borne equally by both parties. 'And it is further agreed that one-half of all the advances made from this date for the erection of buildings, sugar mills, and all current expenses, including salary of the superintendent, and all losses shall be borne equally by both parties, also all the profits arising from the business to be divided equally.' A mutual participation of profits and losses in any business has always been considered as creating a partnership, and there is such a plain communion of interest and mutuality of losses and profits in this case, as to my mind creates a partnership beyond a doubt. If the construction contended for by the learned counsel for the complainant be true, namely, that Spencer is a mere agent of Wood for carrying on the plantation, receiving a stipulated sum for his services, and having none of the rights and powers of a partner over the plantation and its business, why, I would ask, is Spencer to own one-half of the capital stock? Why is he to devote his whole time to the joint interests of both parties? Why pay half the advances and expenses? Why pay half of his own salary as superintendent, or share equally in the losses or profits of the business? *To my mind it is clear that from the signing of the agreement on the first day of October, 1850, Spencer became clothed with all the rights and liabilities of a partner in the East Maui plantation, and had as great a voice and control over its operations and business as the defendant Wood. To call Spencer a mere agent or servant of the*

East Maui plantation while he has a community of interest in all its property, and is to share equally in all its losses and profits, would be doing violence to every principle of the law of partnership. But it is said that the word partnership does not once occur in all the agreement. Very well, such word need not so occur to create a partnership, if the intention of the parties is plain as in this case.” (Emphasis ours.)

It is submitted that the case is similar to the present case in that as of the date of entering into the written agreement, the party, Spencer, entered into an agreement to purchase. The Appellant in this case as of September 15, 1941 also entered into an agreement of purchase. Most of the other attributes for a partnership which were present in that case were similarly present in the present case.

It is submitted that if the above quoted agreement created a partnership as of the day the agreement was signed, then the Appellees and the Appellant also entered into a partnership as of September 15, 1941, the day when the conference was held at the home of the Tenn brothers after returning from the Lum home. (Tr. p. 109.)

It is therefore submitted that all of the necessary elements to have a present partnership existed on September 15, 1941 or at least by October 1, 1941 under the reasons submitted in subparagraphs A, B, C, D, E, and F, and the trial Court erred in not finding an existing partnership relationship as of the

dates indicated. The Supreme Court's refusal to reverse the trial Court's refusal to find an existing partnership was error.

III.

THAT THE SUPREME COURT OF HAWAII ERRED IN COMPLETELY DISREGARDING THE ORAL INTERLOCUTORY DECISION AND THE FACT FINDINGS THEREIN OF THE TRIAL COURT.

The trial Court on July 2, 1948 rendered an interlocutory oral decision and made material fact findings therein. (Tr. pp. 393-399.) The Appellee attempted to seek an interlocutory appeal therefrom. (Tr. pp. 398-399.) The accounting had not been even started so there is no question that the oral decision was interlocutory.

At the end of the aforesaid oral interlocutory decision the Court stated: "the Court * * * will order an accounting." (Tr. p. 398.) The said order was made on July 2, 1948. No written order was entered but on July 24, 1948, twenty-two days later, the following minute order was entered:

"The Court this date *set aside its order for an accounting* on July 2, 1948, and will take the case under advisement." (Tr. p. 43.) (Emphasis ours.)

It is important to note that only the order for accounting was vacated, the trial Judge did not at any time expressly vacate its oral interlocutory decision and the fact findings therein. It has been held that an

order is distinct from the findings. In *Brady v. Interstate Commerce Commission*, 43 F. (2d) 847, at page 850, it is stated:

“An ‘order’ is a ‘mandate, precept; a command or direction authoritatively given; a rule or regulation’ Black’s Law Dictionary; 46 C. J. 1131; 42 C.J. 464. An order of the commission is analogous to the judgment of a court; and it is well settled that the findings upon which a judgment is based constitute no part of the judgment itself even though incorporated in the same instrument. 15 R.C.L. 570; *Judge v. Powers*, 156 Iowa 251, 136 N.E. 315, Ann. Cas. 1915 B., 280. As said by Judge Learned Hand in *Eckerson v. Tanney* (D.C.) 235 F. 415, 418 ‘The judgment itself does not reside in its recitals, but in the mandatory portions’. It has been expressly held that findings of the commission embodied in its reports are not orders within the meaning of the statutes relating thereto. *Am. Sugar Refining Co. v. D. L. & W. R. Co.* (CCA 3) 207 F. 733, *C. B. & O. R. Co. v. Merrian* (CCA 8) 297 F. 1, 3-5.”

See also *G. Amsinck & Co. v. Springfield Grocer Co.* (C.C.A. 8), 7 F. (2d) 855; *Carolina Aluminum Co. v. Fed. Power Commission* (C.C.A. 4th) 97 F. (2d) 435.

Therefore it is respectfully submitted that the oral interlocutory decision was never expressly set aside and fact findings therein were therefore never expressly set aside.

The trial Court on the 25th day of August, 1948 rendered a written decision (Tr. pp. 43-48). By its

very nature and conclusions reached it was a final decision. The gist of the written decision of the trial Court was that Appellant did not tender his \$3000. (Tr. pp. 43-48.) "Equity helps the vigilant, not those who sleep on their rights." (Tr. p. 48.) The trial Court's written decision is not inconsistent with oral interlocutory decision in that in the written decision an additional defense of lack of tender was considered.

There is no statute under the Hawaiian laws requiring that equity decisions be written. Therefore the fact that one was written and the other oral should not make any difference. See *McKenny v. Wood* (Me.) 80 Atl. 836 where the state laws did not require a written decision, an unsigned written decision was held sufficient.

Therefore it is submitted that the following fact findings in the trial Court's oral interlocutory decision (Tr. pp. 393-399) must be given full consideration:

"From the inception of the operation of the Green Mill by the brothers, of which Chong Hing was the active (262) participant, taken from the testimony and the circumstances, and what eventually ended up, it appears to this Court that Chong Hing was not particularly interested in, and was possibly opposed to, having Ching become a partner in this business * * *

It is apparent that when they come right down to drafting the partnership papers themselves there was a desire to leave Ching out of the picture.

Dr. Tong testifies that he felt that Ching, instead of looking after his interest, and doing what

was right, had double-crossed him. What that double-cross was is pretty clear, and taking all the circumstances into consideration this Court arrives at this conclusion with reference to this partnership: It appears that Chong did not want Ching in; he particularly and he finally prevailed upon his brother, Dr. Tong to leave him out. And immediately (263) when Ching heard about this, up at Hiram Fong's office, he telephoned Dr. Tong on Maui, and immediately went over to see him and borrowed money from somebody—borrowed \$75 from somebody, and went to Maui to see about it. In other words, it would appear from his action that he was greatly surprised and chagrined that he was not within the partnership.

Well, this Court believes that at the time that this partnership was actually consummated it really amounted to a squeeze-out of Ching, * * *

(Tr. pp. 394-396.)

Said findings were not specifically set aside and there is nothing in the written decision inconsistent with said findings.

In 3 *Am. Jur.* 457, it is stated:

“Findings of fact made by the trial court in ruling upon motions or in making rulings in the course of a trial are regarded on appeal in much the same manner as findings of fact upon which final judgment is rendered. Thus, a finding by the trial judge denying a motion to set aside a verdict, or for a new trial, for misconduct of the jury, upon the ground that a juror was not impartial, or upon the question of the credibility as a witness of a child upon whose testimony a con-

viction rests, will not be reviewed where there is evidence to sustain the finding made. Nor will the decision of the court below that a witness is competent to testify as an expert be reviewed on appeal if there is any evidence to support it * * *''

See *Crawley v. State*, 151 Ga. 818, 108 S.E. 238; *Jacobs v. Danciger*, 328 Mo. 458, 41 S.W. (2d) 389; *Cook v. Highland Hospital*, 168 N.C. 250, 84 S.E. 352. The interlocutory oral decision was made in the course of the trial in the trial Court. It is submitted that the said findings in the oral decision should be treated in the same manner as other findings of fact made in the written decision upon which the final decree was entered.

IV.

THE SUPREME COURT OF HAWAII ERRED IN HOLDING THAT A TENDER WAS NECESSARY.

On the question of tender the trial Court held as follows:

“* * * The letter to Ching reaffirmed the oral arrangement between the Tenn Brothers and Ching to be partners in the business, and advised Ching that he was to have three shares ‘That is if you get the dong by then’. It also asked Ching to take care of Dr. Tong’s interest in the business.

By the uncontroverted testimony the petitioner never tendered the amount of this subscription (\$3,000.00) to any of the present respondents. He asserts his failure is: no demand was made on him to put up his \$3,000.00 by (39) Chong Hing Tenn who was to take care of the finances. Peti-

tioner admittedly did not get along too well with Chong Hing Tenn and complained to Dr. Tong and was advised that he *would be* in the partnership 'that is if you get the dong (money) by then'. With this warning he made no tender of his share. Then upon learning he was not included in the partnership he borrowed \$75.00 and went to Maui and, according to Dr. Tong, again asked him (the Doctor) to finance him. *Petitioner's story of lack of demand coupled with a promise of a unsecured loan from a competitor to pay his share seems rather weak as against a direct demand and warning by Dr. Tong to get the money, and never discussing the matter of putting up his \$3,000.00 when he knew at the time that the necessary transfer were being made by Attorney Fong * * **

On October 1, 1941, petitioner unquestionably had a right upon putting up \$3,000.00 to get a share in the business. Means were then available to him to learn and be aware of what was going on relative to the proposed (40) partnership. He could have checked on the transfer of the liquor license, the assignment of the lease through either Fong or Lum and the Gross Income License at the Tax Office and acted accordingly. But he did nothing. Equity helps the vigilant, not those who sleep on their rights." (Tr. pp. 46-48.) (Emphasis ours.)

The Supreme Court of Hawaii in its opinion affirmed the foregoing findings of the trial Court. In addition to affirming of said findings the Supreme Court made the following additional findings:

“* * * Under the oral agreement with the seller *fixing the time of payment of the purchase price as October 1, 1941, a limitation of time for performance by the petitioner, during which he was to tender his contributive share, was fixed and agreed upon.* Of this limitation and due date the petitioner, as a party to the very agreement, *possessed positive and unequivocal knowledge and notice.* In addition to the fact that the experimental period of operation by the party purchasers was to terminate on October 1, 1941, during which period the petitioner had ample opportunity to tender his contributive share, the evidence further discloses that the sale, by way of execution of all requisite documents and transfers, was not consummated until October 20, 1941, retroactive to October 1, 1941. The petitioner was by operation of time and with the acquiescence of the respondents, gratuitously accorded an extra period of dispensation in which to tender his contributive share. During this twenty-day period of additional concession, the petitioner failed to perform, and has not, in our opinion and as found by the trial judge, established any valid reason for his default. The letter of October 6, 1941, from Fook Hing Tong to the petitioner, fourteen days prior to the actual consummation of the sale, contains an affirmance that the original agreement between all party purchasers, including the petitioner, was still in effect, though the trial period and the due date of the purchase price on October 1, 1941, expired six days prior thereto. The period within which the petitioner could have tendered his contributive share was thereby extended to October 20, 1941. Of this extension of time in which to perform, the peti-

tioner was also given notice * * *” (Tr. pp. 64-65.)

It is interesting that both the trial Court and the Supreme Court of Hawaii based their findings of demand on the following sentence from the letter of October 6, 1941 from Doctor Tong to the Appellant:

“I have 15 shares and you have 3, that is if you get the dong by then.” (Tr. p. 131.) (Pet. Ex. “A”.)

The trial Court not only changed the “have” to “to have” (Tr. p. 46) and later to “would be” (Tr. p. 47) but interpreted the “dong” clause to be a “direct demand and warning” by Dr. Tong. (Tr. p. 47.) The findings of the trial Court having been made on a document, it is submitted that this Court is in just as good a position as the trial Court to consider the evidence. In *Kind v. Clark* (C.C.A. 2) 161 F. (2d) 36, the Court held:

“In so concluding we rely on the documentary evidence which we are in as good a position as the trial judge to determine.”

The usual rule that fact findings will not be disturbed by an appellate Court unless there is an obvious mistake, *Chas. V. Lilly Co. v. I. F. Laucks* (C.C.A. 9) 68 F. (2d) 175 is not applicable in cases where fact findings are made on documentary evidence or depositions. *Africa Maru* (C.C.A. 12) 54 F. (2d) 265, *Midland Flour Milling Co. v. Babbitt* (C.C.A. 8) 70 F. (2d) 416; *Letcher County, Ky. v. De Foe*, 151 F. (2d) 987; *Sun Ins. Office of London v. Be-Mac Transport*

Co., 132 F. (2d) 535; *Johnson v. Griffiths S. S. Co.*, 150 F. (2d) 224, and *Bowles v. Beatrice Creamery Co.*, 146 F. (2d) 774. Only "slight" weight is given to the trial Court's findings in such case. *Eq. Life Ass. Soc. v. Irelan* (C.C.A. 9) 123 F. (2d) 462.

It is submitted that the word "then" meant *when Appellee, Chong Hing Tenn, made demand* because the trial Court found:

"It was agreed between the parties that upon the formation of the partnership that the active members would be Ching, who would be in charge of the personnel and management of the business, and Chong Hing Tenn who *would take care of the finances and any legal matters.*" (Tr. p. 45.)

The evidence in support of this finding was undisputed. When the letter of October 6, 1941 was written Dr. Tong was not in Honolulu, but it was written from Wailuku, Maui, (Tr. p. 130) an Island other than that on which Honolulu is situated. The admitted evidence is that both Appellant and Chong Hing Tenn worked together at the Green Mill from about September 15, 1941 to October 20, 1941. (Tr. p. 169.) Since Chong Hing Tenn was in charge of finances, Appellant had the right to rely on him. When Dr. Tong wrote the letter he too knew that Chong Hing Tenn was in charge of finances. (Tr. p. 119.)

Dr. Tong testified:

"Q. It was understood it was left—all these financial matters—in your brother's hands, Chong Hing, isn't that right?

A. Yes, some time speak to an attorney to take care of.

Q. That was before you left? (Referring to leaving for Maui.)

A. Before I left." (Tr. p. 119.)

Certainly by no inference could it be said that the money was to be sent to Dr. Tong on Maui. The only reasonable construction is that it was to be paid to Chong Hing Tenn, the person in charge of finances and who worked side by side with Appellant. *It is submitted that "then" meant that it was to be paid when Chong Hing Tenn demanded the money. Any other construction would be unreasonable and arbitrary.*

The reason why Chong Hing Tenn did not make demand was as he testified:

"Q. Where did Mr. Ching come into the picture, if he came at all?

A. *I don't know about him. I didn't do business with him.*

Q. Did your brother Fook Hing?

A. Maybe he did; not with me." (Tr. p. 156.)

Whether that was the true reason or whether Chong Hing Tenn wanted the entire business for himself—*No demand was made by Chong Hing Tenn.* In fact on October 6, 1941 the same day as the date of the "dong" letter of Dr. Fong, Hiram Fong, the attorney for the Appellees, wrote to the Liquor Commission asking for a transfer of the license to Chong Hing Tenn only. (Tr. pp. 202-203.) In other words on the same day Dr. Tong wrote Appellant that you *have 3*

shares, Appellee, Chong Hing Tenn, was undertaking to double-cross his own brothers and Appellant.

All of argument "I." is repeated here because the fiduciary relationship required Chong Hing Tenn who took care of finances to keep Appellant fully informed. He not only refused information as argued in argument "I." but did not make demand so that he or his family may keep the business for themselves.

There is no finding that the Appellant was unable to raise his \$3,000.00. The trial Court merely held:

"He *asserts* that he made arrangements with one K. C. Wong, the owner and operator of the Riverside Grill (a restaurant and bar) to loan him, when needed, the sum of \$2,000.00 without any security and the balance was to be raised by putting an additional mortgage on his house." (Emphasis ours.)

This is not a fact finding that Appellant was not able to get the money. The uncontradicted testimony of Mr. K. C. Wong was:

"A. I asked Mr. Ching, and he said about \$3,000. 'Why didn't you put in \$5,000?'

Q. Who said that?

A. I said that. He said that he hasn't got enough money. So he asked me for a loan. I said, 'I can help you.'

Q. Mr. Ching asked you to help him a little bit?

A. Yes.

Q. Were you ready to help him?

A. Yes.

Q. Did you tell him that?

Yes." (Tr. p. 191.)

“Q. What do you mean?

A. About \$2,000 I promise him, if he mortgage his house he can get \$3,000.

Q. When was this, Mr. Wong, was this before you had the conference with Ching and Tong?

A. Yes. Before that he buy the place.

Q. Did you see Ching before he and Doctor Tong came up to your place of business to discuss this question of whether this was a good buy?

A. Yes.

Q. Was it on that occasion that you told him that you could give him about \$2,000?

A. Yes.

Q. Did he ever come back after that to get the \$2,000?

A. He came back and asked me if I am ready. I said, ‘Any time you are ready, come and get it.’ ” (Tr. p. 192.)

“Q. Were you going to loan him the money on the basis of a mortgage or something else?

A. No. Just loaning him the money.

Q. Without security?

A. Yes.” (Tr. p. 193.)

“A. I never gave him. I loaned him a check when he went up to Maui, \$75 to try to see Tong.

Q. Did he borrow money from you to go up there on that?

A. Yes.” (Tr. p. 194.)

Such uncontradicted and unimpeached testimony cannot be disregarded by the trial Court. *San Francisco Association for the Blind v. Industrial Aid for the Blind*, 152 F. (2d) 532; *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 51 Sup. Ct. 453, 75 L. Ed. 983.

It is submitted that a finding that Appellant had money ready and willing should have been entered by the trial Court.

Furthermore, it is submitted that by the behavior of the Appellees they made tender useless. In *H. Johnson v. T. P. Tinsdale*, 4 Haw. 605, the Court stated:

“ ‘It is a general rule that when the tender or performance of an act is necessary to the establishment of any right against another party, this tender or offer is waived or becomes unnecessary when it is reasonably certain that the offer will be refused.’ ”

See also

Aikoe v. F. H. Hayseldon, 6 Haw. 534, at page 537.

Dr. Tong testified as follows:

“A. The letter was written to Chong Hing Tenn, about his conduct, cold, pulling stone faces, driving business away with that kind of mug he has, not getting along with the employees. We had a gold mine. There was a gold mine there. He would sure ruin the business.

Q. After you had written the letter which you have in your hand, Petitioner's Exhibit A, did you hear any other reports about the business? Just answer that yes or no.

A. Yes.

Q. As a result of hearing these reports, did you do anything?

A. Yes. I wrote a letter.

Q. To whom did you write a letter?

A. Mr. Ching. I told him to vacate the premises.

Q. By that, what premises did you mean?

A. I mean the Green Mill there.

Q. What happened to that letter, if anything?

A. He returned that letter to me, he said he is not guilty.

Q. Do you have that letter?

A. Well, that went all through all the process in the blitz, I couldn't keep anything.

Q. You do not have possession of that document?

A. No.

Q. Now, was that letter addressed to him prior to or after his trip to Maui?

A. It was prior to his trip to Maui.

Q. Was that letter addressed to him prior or after your executed partnership agreement?

A. That letter was prior to the execution of the partnership agreement.

Q. Did you give any reasons in your letter to Ching, why you wanted Ching—

A. Yes.

Q. What was the substance of those reasons?

A. One of them that he didn't have any money in the business, another thing, his conduct, his character, so far as business is concerned, it wasn't businesslike. That he had broken faith with me. I had all confidence and faith in him, and he had betrayed my confidence. After writing this letter, I then backed him up to the limit, but I got a report from several sources—

Q. Never mind what the reports were, that is hearsay. Your testimony is that he returned that

letter to you with the notation in his own handwriting to the effect 'not guilty'?

A. I remember now. It was on the other side. The letter was a page and half in my handwriting. He wrote on the back of it, 'Not guilty.' '' (Tr. pp. 346-347.)

"Q. When you wrote this letter that you told him to vacate or get out, when did you do that?

A. I think it was about around Thursday, I think.

Q. Thursday?

A. On the 9th. I think I checked these dates up. The 9th was Thursday. Monday was the 6th. That was the date, Monday afternoon. I checked on the Inter-Island at the time. My recollection of checking these things—it was in 1944, when it first came up—I got to refresh my memory, so I checked around for the date. It was hazy to me then." (Tr. p. 366.)

"Q. What prompted you to write that letter?

A. Well, adverse reports.

Q. I thought you advised me that you were not in communication with folks over here.

A. I had a letter from my brother then, answering my letter to him. Then there were people coming up for the fair. They gave me all kinds of reports of what is going on over there, that Mr. Ching was in there. He was ruining business. He has two or three shots, and then he calls all his friends in. Then he is trying to live on the house. Everything is on the house. A certain fellow seen him take a bottle out, jeopardizing the business license. There is other occasions, *too*.

Q. That is what some other people told you.

A. Reports came in from people that I told them to take a look, too." (Tr. p. 367.)

In other words by the time the letter of October 6, 1941 got to the Appellant or about one day later, on October 9, 1941, Dr. Tong made up his mind that Appellant was out. Appellant was told to vacate. Chong Hing Tenn wrote to Dr. Tong so Chong Hing Tenn must have taken the same position as Doctor Tong. This letter relating to vacating the premises is Dr. Tong's own letter so Appellees cannot deny this. Therefore, on Appellees' own admitted fact, that Appellant was told to vacate—tender was made useless. It made it certain that tender would be useless.

In addition to the foregoing admitted notice to vacate by Dr. Tong, the Appellees' very act of taking the business in their own name only without even making a proper demand on the Appellant showed an intent to "squeeze-out" the Appellant. Certainly one who intentionally and unlawfully "squeezes out" another cannot expect a court of equity to aid him with a defense of "no tender". In 52 *Am. Jur.* 218, it is stated as follows:

"The rules concerning the necessity for an actual tender are not, as a general rule, applied with the same stringency in equity as at law. In equity the failure to make formal tender frequently may be cured by a plea of readiness and willingness and the paying of the money into court, provided a formal tender is not a condition precedent to the enforcement of the rights of the

pleader. Again, in a suit to set aside a sale of property a tender of money made in the pleadings, followed by a payment thereof into court, is a sufficient tender. *As at law, an actual tender by the debtor is unnecessary when it is plain, from the acts or conduct of the other party or the circumstances or situation of the transaction or property, that a tender would be nugatory, since equity does not require a useless and idle formality. To illustrate, where the other party has openly refused to perform in compliance with his contractual obligations, the debtor need not make a tender or demand; it is enough that he pleads his ability, readiness, and willingness, and in his pleading, offers to perform his obligations.* It has been said that uncontradicted evidence in behalf of the debtor that he is ready, able, and willing to pay whatever amount a court in equity shall determine, to whomsoever the court shall determine is entitled thereto, is sufficient to protect his rights, equally with an actual tender, where fault for the nontender or nonpayment was not his. In further illustration of the rule in equity, it has been held that a tender of the amount due on a contract for the sale of real estate is not necessary, if the vendor states that it will be useless * * *'' (Emphasis ours.)

See also:

Sherwood v. Greater Mammoth Vein Coal Co.,
193 Iowa 365, 185 N.W. 279;

Rockland-Rockport Lime Co. v. Leary, 203 N.Y.
469, 97 N.E. 43;

Niedermeyer Inc. v. Fehl, 153 Or. 656, 57 P.
(2d) 1086;

Comstock Mfg. Co. v. Schiffmann, 133 Or. 677,
234 P. 293.

Therefore it is submitted that both the Supreme Court and the trial Court erred in holding that Appellant's tender of \$3,000.00 was necessary.

V.

THE SUPREME COURT OF HAWAII ERRED IN MAKING THE FOLLOWING FACT FINDINGS AND CONCLUSIONS.

(A) The Supreme Court of Hawaii made the following additional finding:

“The record bears no rescission or cancellation of the original agreement which entitled the petitioner to participate *in the purchase conditioned upon the payment of his contributive share of \$3,000, by any or all of the respondents, or by the petitioner himself.*” (Objectionable portion emphasized.) (Tr. p. 64.)

A careful reading of the foregoing fact finding makes one wonder what the Supreme Court of Hawaii meant. It is not only ambiguous but it doesn't make any sense. But taking it to mean that by the original agreement the Appellees could have prevented Appellant's participation in the obtaining of the legal title by paying Appellant's \$3,000.00 contribution, it is submitted that the record does not permit any such construction of the original agreement.

(B) The Supreme Court of Hawaii made the following additional finding:

“Under the oral agreement with the seller fixing the time of payment of the purchase price as October 1, 1941, a limitation of time for performance by the petitioner, during which he was to tender his contributive share, was fixed and agreed upon.” (Objectionable portion emphasized.) (Tr. p. 64.)

The Appellant testified as follows with relation to the date of payment:

“Q. Was there anything said about when the money was to be paid in by the parties?

A. No. Nothing was said as to when the money was to be paid in.

Q. Was there anything said when you were supposed to put the \$3,000 in?

A. Never said anything to me as to when to put the \$3,000 in.

Q. Was it subject to Mr. Chong Hing's call?

A. At any time, subject to his call.

Q. Was that the agreement of the parties at the time?

A. That was the agreement.

Q. So far as you are concerned, then you were supposed to contribute your \$3,000 when Chong Hing notified you?

A. Whenever the papers were ready, when the business was about to be consummated.” (Tr. pp. 286-287.)

None of the Appellees denied this. In fact the Appellant's testimony is substantiated by Dr. Tong's letter of October 6th, 1941, Petitioner's Exhibit A, (Tr. p. 131) wherein it is stated:

“I have 15 shares and you have 3, that is if you get the dong by then.” (Tr. p. 131.)

Dr. Tong testified with relation to the said letter:

“Q. And failed to indicate to him any date within which you expect him to contribute his portion of the money, isn’t that true? Your letter of the 6th does not indicate any date, does it?

A. No. I held for him, I think, due on the 1st of the month.” (Tr. pp. 369-370.)

His testimony following the above positively shows that he meant October 1, 1941. Dr. Tong in so testifying clearly committed perjury to mislead the trial Court.

The Supreme Court of Hawaii did not carefully review the record. Such additional findings were therefore clearly arbitrary and without supporting evidence.

(C) The Supreme Court of Hawaii made the following additional findings:

“In addition to the fact that the experimental period of operation by the party purchasers was to terminate on October 1, 1941, *during which period the petitioner had ample opportunity to tender his contributive share*, the evidence further discloses that the sale, by way of execution of all requisite documents and transfers, was not consummated until October 20, 1941, retroactive to October 1, 1941. *The petitioner was, by operation of time and with the acquiescence of the respondents, gratuitously accorded an extra period of dispensation in which to tender his contributive share. During this twenty-day period of additional concession, the petitioner failed to perform, and has not, in our opinion and as found by the*

trial judge, established any valid reason for his default.” (Objectionable portion emphasized.) (Tr. pp. 64-65.)

The Supreme Court of Hawaii in concluding and finding that there was no valid reason for Appellant’s default was not aware of the law of “confidential relationship” argued in Argument I. All of Argument I and Argument IV of this brief are hereby referred to by reference. The Supreme Court again erred in making these additional findings.

(D) The Supreme Court of Hawaii made the following additional finding:

“The letter of October 6, 1941, from Fook Hing Tong to the petitioner, fourteen days prior to the actual consummation of the sale, contains an affirmance that the original agreement between all party purchasers, including the petitioner, was still in effect, though the trial period and the *due date of the purchase price on October 1, 1941, expired six days prior thereto. The period within which the petitioner could have tendered his contributive share was thereby extended to October 20, 1941. Of this extension of time in which to perform, the petitioner was also given notice.*” (Objectionable portion emphasized.) (Tr. p. 65.)

The objection that the due date was originally agreed upon as October 1, 1941 is covered by Argument V (B) so it will not be repeated here. The findings that the due date was extended to October 20th and that Appellant was given *notice* thereof is certainly not supported by the record. The Supreme Court set

October 20, 1941 as the due date because the Bill of Sale was dated as of that day. Otherwise, October 20, 1941 is of no significance. Actual notice cannot be imputed by using hindsight legal mechanics. The Supreme Court erred in using such tactics.

(E) The Supreme Court of Hawaii made the following additional finding:

“The purchase price was payable by the party purchasers on October 1, 1941. The petitioner, as a party to that oral agreement, was aware of and so bound, as were all the party purchasers, by this due date of payment.” (Objectionable portion emphasized.) (Tr. p. 94.)

Argument V (B) clearly covers this fact finding. Clearly the Supreme Court erred in making the foregoing finding.

(F) The Supreme Court of Hawaii made the following additional finding:

“The record further discloses that petitioner’s right of contribution was expressly conditioned upon tender of his contributive shares as agreed upon. This he failed to do.” (Objectionable portion emphasized.) (Tr. p. 66.)

Here again it is difficult to determine what the Supreme Court meant. It must have meant right of participation instead of “contribution”. Otherwise the sentence does not make any sense. Assuming that it meant participation, it is submitted that the fact finding that he failed to contribute is erroneous. Arguments I and IV are repeated here. Under said argu-

ments of breach of fiduciary duty and excuse of tender, this finding was erroneous.

VI.

THE SUPREME COURT OF HAWAII ERRED IN HOLDING THAT IT WAS NOT MATERIAL TO RULE AS TO WHETHER THERE WAS AN EXISTING PARTNERSHIP.

The Supreme Court of Hawaii held as follows:

“Upon the entire record on review, whether or not the original oral agreement between the parties to the proceeding constituted a copartnership or joint adventure binding them with the legal incidents flowing therefrom, is not pertinent to the disposition of the issues of fact presented which are determinative of the sole question presented on appeal.” (Tr. p. 67.)

It is submitted that it was obligatory upon the record for the Supreme Court to rule whether or not a partnership or joint enterprise existed.

Failure to tender one's contributive share does not necessarily prohibit a partnership. Arguments I, II, and IV are repeated herein.

CONCLUSION.

It is respectfully submitted that the decision of the Supreme Court of Hawaii be reversed and an appropriate order be entered by this Court ordering an

accounting and other relief as prayed for in Appellant's bill as filed in the trial Court.

Dated, Honolulu, Hawaii,
April 23, 1951.

Respectfully submitted,
SHIRO KASHIWA,
Attorney for Hung Chin Ching,
Appellant.

No. 12,784

IN THE

United States Court of Appeals
For the Ninth Circuit

HUNG CHIN CHING,

Appellant,

vs.

FOOK HING TONG, CHONG HING TENN
and KUI HING TENN,

Appellees.

Upon Appeal from the Supreme Court of Hawaii.

BRIEF FOR APPELLEES.

J. GARNER ANTHONY,

THOMAS M. WADDOUPS,

FRANK D. PADGETT,

312 Castle & Cooke Building, Honolulu 1, Hawaii,

Attorneys for Appellees.

ROBERTSON, CASTLE & ANTHONY,

312 Castle & Cooke Building, Honolulu 1, Hawaii,

Of Counsel.

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No. 12,784

IN THE
United States Court of Appeals
For the Ninth Circuit

HUNG CHIN CHING,

Appellant,

VS.

FOOK HING TONG, CHONG HING TENN
and KUI HING TENN,

Appellees.

Upon Appeal from the Supreme Court of Hawaii.

BRIEF FOR APPELLEES.

JURISDICTIONAL STATEMENT.

The jurisdiction of the Hawaiian courts is based upon Section 81 of the Organic Act of Hawaii (48 U.S.C. Section 631). The jurisdiction of the Circuit Judge at Chambers was founded upon Sections 12401 and 12402, R.L.H. 1945, conferring upon the circuit judge jurisdiction to hear and determine equitable causes. The jurisdiction of the Supreme Court of Hawaii rested upon Sections 9604 and 9503 as amended, R.L.H. 1945, and that of this Court rests upon 28 U.S.C. Section 1293, the jurisdictional amount being

established by affidavit (R. 85). The final order of the Supreme Court of Hawaii was entered September 12, 1950 (R. 68). A petition for rehearing was denied on November 16, 1950 (R. 77).

STATEMENT OF THE CASE.

The bill in the present action is entitled "A Bill to Declare Trust and Lien, for an Accounting, for Receiver, and for Money Judgment."

Appellees are brothers (R. 108). On an evening in the latter part of September 1941, they met at their father's house in Honolulu. Also present were their father and appellant, Hung Chin Ching (R. 108). Appellees had heard that the Green Mill was for sale (R. 154). As a result of this information the whole group went out to talk to Lum Kam Hoo, the proprietor. He told them the price was \$25,000, plus inventory, and referred them to his attorney, Hiram Fong, who was to handle the necessary papers (R. 111). The group then returned to the father's home where they discussed finances. Appellant wanted to come in on the deal for a \$3,000 interest (R. 112). Dr. Tong, one of the appellees, testified:

All I can remember now,—it is so long ago— is that Mr. Ching had no finances. He was trying to induce me to finance him on the thing. I told him if he wanted to get in, he must take the risk, at least show good faith by putting his money in. (R. 112).

A few days later Dr. Tong left his \$10,000 in the hands of Kui Hing, another of the appellees, and returned to Maui where he was stationed (R. 123).

As Elsie Lum, the wife of the vendor and the owner of an interest in the business, testified, before the sale could be completed, a meeting with the Liquor Commission was necessary and, pending that meeting (which it was realized would take a couple of weeks to arrange) Chong Hing Tenn, the third appellee, and Hung Chin Ching came over and operated the business (R. 258).

Apparently Chong Hing Tenn and Ching did not get along too well (Petitioner's Exhibits A, R. 130, and A-1, R. 133). Chong Tenn testified that the disagreement was occasioned by Ching's drinking on the premises (R. 242).

In the interval before the sale could be completed, appellees Chong Hing Tenn and Kui Hing Tenn were out trying to raise the money which they had agreed to contribute toward the purchase price. The evidence shows that they were successful in their efforts by the 30th of September (Respondents' Exhibit 2, R. 374).

On the 30th of September they paid Lum Kam Hoo \$15,000 (Res. Ex. 3, R. 376), and on the 2nd of October the remaining \$10,000 (Res. Ex. 4, R. 377).

On October 6, 1941, Hiram Fong sent a letter to the Liquor Commission on behalf of Elsie Lum requesting that the liquor license be transferred to

Chong Hing Tenn. Attached was a bill of sale from Elsie Lum to the appellees dated October 10 (R. 202). On October 9, 1941, a report was filed by the Assistant Chief Inspector to the Commission approving the transfer (R. 203), and the license was granted October 10 (Pet. Ex. B, R. 159).

The partnership agreement among the appellees is dated October 14 and recites that the partnership was entered October 1 (Res. Ex. 1, R. 146). Dr. Tong signed this agreement October 16 (R. 145).

The actual bill of sale which completed the transfer is dated October 20 (Pet. Ex. C, R. 161). Notice of the sale appeared in the Advertiser on October 23 and 24 (Pet. Ex. H, R. 232) and the assignment of the lease was made October 30 (Pet. Ex. G, R. 227).

Although appellant testified at one point that he considered himself a proprietor of the business from the time it was taken over (R. 313), he did not resign from the police force despite the fact that the rules of the department provide that no one may be a police officer who is interested in a liquor establishment (R. 195, 313), and at another point in his testimony he stated: "If I had purchased an establishment I would have resigned" (R. 281). Nor did he, during the period of over a month while the transfer was taking place, ever make any move toward contributing the \$3,000 upon which his participation in the enterprise was conditioned (R. 112, 251; Pet. Ex. A, R. 130), despite the fact that both Chong Hing Tenn and Dr. Tong asked him for payment (Pet. Ex. A,

R. 130, 145, 168, 244, 345) and that Dr. Tong made it clear that he would have to put up his money if he was to take part (Pet. Ex. A, R. 130, 145, 345).

Appellant testified that he could have raised the money (R. 304), although he never did have the money in hand (R. 194) and although he was actually in a very bad financial situation at this time. In September a check he had given the Green Mill bounced (R. 317) and a little later when he flew to Maui to see Dr. Tong he had to get an unsecured loan of \$75.00 to make the trip (R. 194). He testified that the reason he never came forward with the money was that Chong Hing Tenn never asked for it (R. 303). He also produced a witness who testified that he would have loaned him \$2,000 without security (R. 192). Appellant further testified that he planned to raise the other \$1,000 by giving a second mortgage on his house to his brother (R. 304). The record does not, however, disclose that appellant ever made any inquiry as to when the money would be needed, despite Dr. Tong's warning (Pet. Ex. A, R. 130) and despite the fact he knew the steps necessary to complete the sale were going forward (R. 270, 328, 332, 339, 340).

In order to get the approval of the Liquor Commission, an application for the transfer of a license must have a bill of sale attached (R. 337). The Liquor Commission has a policy against hidden partners in such an establishment (R. 213). It was necessary to inform the Commission who the new

proprietors would be. Accordingly Chong Hing Tenn early in October informed Hiram Fong, who was drawing the papers, that the partners would be the three appellees (R. 168). Since appellant had failed to produce his share on demand (R. 168, 331) and since he was in bad financial straits (R. 194, 317), it appeared unlikely that he would put up the \$3,000, so he was not named as a partner, but Dr. Tong testified that he was still holding three shares for him if he got the money (R. 364); that he was willing to let him in, even as late as the time of the telephone call from Hiram Fong's office; and that he stated this to appellant at that time (R. 145).

On the 11th of October, appellant went to Hiram Fong's office and there learned that the partnership papers were being drawn up and that he was not named in them. From Fong's office he telephoned Dr. Tong on Maui (R. 150, 328). Dr. Tong testified that he told Ching he was in if he had the money (R. 150). Appellant then borrowed \$75.00 (R. 194) and the next day went to Maui to see Dr. Tong (R. 150, 371). He still did not offer to put up his share, so Dr. Tong informed him that since he hadn't put up the money he was out (R. 145, 372). Shortly after this, appellant ceased working at the Green Mill (R. 237).

Appellees had signed a note and mortgage of the premises to pay off the inventory of \$10,046.27 (R. 223). They were paying it at the rate of \$1,000 a month (R. 131) when the events following the Japa-

nese attack on Pearl Harbor closed the business, whereupon Dr. Tong assumed \$5,000 of the amount remaining to be paid (R. 138).

Appellant never did offer to pay his share. He took no further action of any kind until after the business had weathered the period following Pearl Harbor (during which it was completely closed) and was doing a rushing business. Then in January 1944 he made demand on appellees for a share (R. 319) and in April of that year commenced this action.

SUMMARY OF PLEADINGS AND PROCEEDINGS BELOW.

The bill which appellant filed on April 5, 1944, alleged the original meeting with Lum, an agreement among the parties, and the taking over of the business during the so-called trial period. As a basis for his claim to relief, the appellant alleged, in substance, that he was at all times ready, willing and able to put up his share of the purchase price but that appellees, in violation of the original agreement and in fraud of his rights, purchased the business for themselves. Appellant prayed, among other things, for a declaration of trust of the business, for the declaration of a lien on the business, for an accounting, and for a money judgment. A series of demurrers followed, which were sustained.

Finally in November 1947 a fourth amended bill was filed which contained the added allegation that in January 1943 Dr. Tong had promised, in respect

to this claim, to compensate appellant and that, relying on this assurance, he had delayed his action until the passage of time convinced him that appellees would not keep their promise.

On the basis of this allegation of negotiation as late as January 1943, the last demurrer was overruled and the case went forward.¹

Appellees answered the bill on June 16, 1948. In their answer they denied the allegations of paragraphs III to XIV, inclusive, of the petition wherein the appellant had set out his version of the happenings and the relations among the parties. They also denied that any agreement for a partnership among the parties had ever been consummated; that appel-

¹The following testimony is the whole of the evidence offered at the trial in support of this detailed and crucial allegation added in order to overcome the demurrer (R. 311):

Q. Now you say that you thought Doctor Tong would do the right thing by you in the Green Mill?

A. That's right.

Q. So Doctor Tong,—did Doctor Tong indicate in any way that he would, during that time?

A. Nothing concrete.

Q. Pardon?

A. Nothing concrete was done by him.

Q. Did he give you the impression that he would?

A. Yes.

MR. LEE: Your witness.

Cross Examination

BY MR. WADDOUPS:

Q. After your conference on Maui, how many times did you see Dr. Tong again, between that conference time and the time you filed this suit?

A. How many times? Many times.

Q. Where?

A. At his home.

Q. Here?

A. In Honolulu.

Q. You called on him personally?

A. Yes.

lant had ever made a tender of the \$3,000; and that they had ever negotiated with him toward a settlement of his alleged claim. They stated that they had at all times acted in good faith toward appellant.

They then went on to deny paragraphs XV to XXI of the bill, and to allege laches by way of further defense.

On the issues joined the case was tried, and at the conclusion of the hearing the trial judge rendered an oral decision finding for appellant. Some three weeks later the trial judge set aside his oral ruling and took the case under advisement (R. 43). A month later he issued a written decision finding for the appellees (R. 43). In this decision, after setting out the sequence of events, the trial judge said:

Petitioner's story of lack of demand, coupled with the promise of an unsecured loan from a competitor to pay his share, seems rather weak as against a direct demand and warning by Dr. Tong to get the money, and never discussing the matter of putting up his \$3,000.00 when he knew at the time that the necessary transfers were being made by attorney Fong. (Decision p. 5)

At the conclusion of his opinion, the trial judge said:

It was not until late 1943, when every bar in town had a doorman or bouncer to keep the prospective customers from overcrowding the bars, and all bars had for over a year been doing a land office business, that petitioner sought to get his original agreed share in the business.

On October 1, 1941, petitioner unquestionably had a right upon putting up \$3,000 to get a share

in the business. Means were then available to him to learn and be aware of what was going on relative to the proposed partnership. He could have checked on the transfer of the liquor license, the assignment of the lease through either Fong or Lum, and the Gross Income License at the Tax Office, and acted accordingly. But he did nothing. Equity helps the vigilant, not those who sleep on their rights.

The agreement on which this action is based was one to form a partnership. It was never formed, principally because the petitioner could not, would not, or did not put up his share of the investment in the proposed venture, and the court can see no equity in his present request to share in the profits of the industry and financed enterprise of the respondents.

A decree in favor of the respondents and against the petitioner, together with costs, will be signed on presentation.

A decree in accordance with the decision was entered on September 2, 1948.

The Supreme Court of Hawaii in its decision reviewed the pleadings, the findings of the trial judge and restated its rule as to the scope of review of findings of fact on equity appeals, stating that the sole question was whether the evidence was such as to warrant the finding made below (R. 63). It stated:

From a review of the record and the facts established below, we find that the petitioner has failed to prove either bad faith, a violation of or exclusion from the oral agreement that he become a party purchaser, a violation of confi-

dence reposed by him in the respondents, or fraud perpetrated upon him by any or all of the respondents.

The Supreme Court held that:

The record further discloses that petitioner's right of contribution was expressly conditioned upon tender of his contributive share as agreed upon. This he failed to do. (R. 66)

The court found (R. 64-67) that the parties entered into an agreement to purchase the Green Mill Cafe, the purchase price being payable October 1, 1941, and that appellant knew of this date as was admitted by his sworn petition; that the purchase was not, however, consummated until October 20, 1941; that the appellant therefore had by the operation of time and the consent of the appellees until that date to perform; that he had notice of this extension but that he did not come forward with his share and had given no satisfactory reason for this failure. Accordingly without reaching the question of laches it affirmed the decision below.

Appellant subsequently filed a petition for rehearing urging principally that with the making of the oral agreement to purchase the premises the appellant along with appellees then and there became an equitable owner of those premises. Presumably the point of this assertion was that this relieved him of the necessity of contributing his share. Appellant also urged that there was a joint venture formed, that the oral decision made by the trial judge was still extant

and required a finding for him. The Supreme Court in denying the petition reiterated in substance that the failure of appellant to contribute his share of the capital prevented his recovery against the appellees under the agreement between them. In regard to the oral decision of the trial court, the Supreme Court stated that it was at variance with the written decision (R. 79) and further, that since the appeal was from the decree under the Hawaiian statutes and cases and not from the decision the point was without merit.

From the two decisions of the Supreme Court of Hawaii the appellant has come here with twenty assignments of error.

QUESTIONS PRESENTED.

(1) Did the Supreme Court of Hawaii commit manifest error in holding that appellant could not recover because of his unexcused failure to meet the condition precedent to his becoming a partner in the ownership of the Green Mill, i.e., to contribute the agreed sum of \$3,000?

(2) Was appellant guilty of laches in delaying two and one-half years in filing this action?

SUMMARY OF ARGUMENT.

Appellant in his brief has ignored completely the established principle of law as to the scope of review which this court will afford on questions of law and fact appealed from the Supreme Court of Hawaii. Conclusions and findings of the Supreme Court of Hawaii will be reversed only where there is manifest error. Such is not the present case, for there are ample authorities and evidence to support the conclusions and findings of the court below. These conclusions and findings turn largely on the credibility and weight of the evidence adduced at trial and are not only the concurrent findings of both courts but are obviously correct on a reading of the record.

Moreover the decree below is sustainable upon the alternative trial court ground of laches which the Supreme Court of Hawaii did not reach.

ARGUMENT.

I.

THE SUPREME COURT OF HAWAII WAS CORRECT IN HOLDING THAT APPELLANT, BY REASON OF HIS FAILURE TO CONTRIBUTE HIS AGREED SHARE OF THE PURCHASE PRICE, IS NOT ENTITLED TO RELIEF.

A. The decision below is reversible only if manifest error was committed in making findings of fact or conclusions of law.

In *Waialua Agricultural Co. v. Christian*, 305 U.S. 91 (1938), the Supreme Court of the United States stated:

It is true that under the appeal statute the lower court had complete power to reverse any ruling of the territorial court on law or fact; but we are of the opinion that this power should be exercised only in cases of manifest error. (305 U.S. 109).

This principle has been reaffirmed repeatedly in this court.

Lord v. Territory of Hawaii, 79 F. (2d) 761 (C.A. 9, 1935);

Walker v. O'Brien, 115 F. (2d) 956 (C.A. 9, 1940);

Pioneer Mill Co. v. Victoria Ward, 158 F. (2d) 122 (C.A. 9, 1946);

De Mello v. Fong, 164 F. (2d) 232 (1947);

Meyer v. Territory of Hawaii, 164 F. (2d) 845 (C.A. 9, 1947);

Carey v. Hilo Finance & Thrift Co., 170 F. (2d) 236 (C.A. 9, 1948).

It was restated by the Supreme Court of the United States with reference to Puerto Rico in—

Bonet v. Texas Co., 308 U.S. 463 (1940); and

De Castro v. Board of Comm'rs., 322 U.S. 451 (1944);

in both of which the Supreme Court equated manifest error to inescapable error.

In *Carey v. Hilo Finance & Thrift Company*, *supra*, where the Hawaiian courts had been called upon to determine as a matter of fact from the evidence what the agreement between the litigants had been upon

which the suit was brought, this Court affirmed, saying:

We think the conclusion reached by the Supreme Court of Hawaii could be reasonably drawn from the evidence.

170 F. (2d) 236, 237.

In similar situations the Court of Appeals of the First Circuit dealing with appeals from the Supreme Court of Puerto Rico had stated the rule to be that such findings of fact when supported by evidence will be adopted, *Reyes v. La Capital De Puerto Rico*, 106 F. (2d) 199 (C.A. 1, 1939); or that where there is conflicting evidence on disputed questions of fact, the trial judge having seen the witnesses and been in a better position to judge their credibility, and the findings of the two lower courts being in accord, those findings will be adopted, *Morales v. Velez*, 18 F. (2d) 519 (C.A. 1, 1927).

Appellant significantly has omitted all reference to this chain of decisions in his brief or to the principles announced therein. The force and effect of these principles cannot be avoided, however, and their application denies a reversal in this case.

B. The evidence supports the findings of fact of the courts below.

In the statement of facts in this brief, *supra*, detailed reference is made to the evidence as it appears in the record. We will not repeat that statement here.

The crucial findings of the courts below were:

(1) That the contribution of \$3,000 by appellant was a condition precedent to his becoming a partner with appellees in the ownership of the Green Mill Cafe (R. 66).

Evidence supporting this can be found in Petitioner's Exhibit A (R. 130) and in the testimony of Dr. Tong (R. 112) and of appellant himself (R. 285, 287). There is apparently no disagreement as to this fact.

(2) That appellant did not contribute his \$3,000.

This is undisputed (R. 66).

(3) That this failure arose not from fraud or unfair dealing on the part of appellees but through appellant's own fault (R. 66-68).

In this connection the court found that the time for performance originally set by the parties was October 1, 1941 (R. 64), (this had been alleged in the petition, par. V, R. 6) but that the purchase was not consummated until the 20th of October retro-active to the 1st (R. 65). This is supported by Petitioner's Exhibit C (R. 161).

The court found that as a party to the oral agreement with the seller (which he admittedly was) he knew of the original time of performance, but that appellees acquiesced in giving him until the agreement was consummated to perform and gave him notice of this extension. This is supported by Petitioner's Exhibit A (R. 130) of October 6, 1941, in

which he was told he had three shares—"that is if you get the dong (money) by then"; by the testimony of Chong Hing Tenn that he demanded the money from him (R. 168, 244); by the evidence of Dr. Tong that as late as the phone call from Attorney Fong's office he told appellant he was in if he got the money (R. 145, 345); and by the evidence that the appellant was well informed as to the progress of the transfer since he was present when the inventory of the stock was taken (R. 270) and was dropping into Attorney Fong's office to check on the progress being made with the legal papers (R. 328, 331, 332, 339, 340). Attorney Fong testified:

Q. In fact, it was your understanding at the time that Mr. Ching was one of the principal cogs in the wheel?

A. Well, he came to my place three or four times and talked about it. I think he also talked about an inventory, and things like that.

Q. All the details that went with the purchase of the business?

A. He seemed to know what was going on.

In the light of this evidence the court rejected appellant's explanation that he did not contribute because no demand was made upon him for the money, and ruled as a matter of law that having failed to meet the condition precedent of contribution appellant could not recover. Clearly the evidence supports the findings of the court.

C. The legal conclusions of the court were correct.

The question of what the terms of a contract are when there is a dispute in the evidence is of course one of fact.

Carey v. Hilo Finance & Thrift Co., supra;
Murphy v. Nelson, 306 Mass. 49, 27 N.E. (2d) 678 (1940);
McCormack v. Jermyn, 351 Pa. 161, 40 A. (2d) 477 (1945);
Copp v. Van Hise, 119 F. (2d) 691 (C.A. 9, 1941);
Rizzo v. Cunningham, 303 Mass. 16, 20 N.E. (2d) 471 (1939).

As we have pointed out, the Hawaiian Supreme Court held that the appellant's participation as an owner and partner in the Green Mill was by agreement conditioned on his putting up his agreed \$3,000 contribution and that he failed to do so through his own fault and not that of appellees. Accordingly the court concluded that appellant could not recover as a partner.

It is black letter law that a party cannot claim as a partner until he has performed the conditions precedent in the agreement of partnership.

68 *C.J.S.* Partnership, Section 11.

Numerous cases from differing jurisdictions have applied this principle and denied petitioners recovery in situations similar to this.

Bird v. Hamilton, Walker's Chancery (Mich. 1844) 361;

Westwood v. Cole, 120 N.Y.S. 884 (1910);
Costello v. Gleeson, 19 Ariz. 532, 172 P. 730
 (1918);
Lipscomb v. Ballard, 106 W. Va. 694, 146 S.E.
 826 (1929);
Chancellor v. Brachman (Tex. Civ. App.), 41
 S.W. (2d) 1014 (1934);
Cohen v. Standard Acc. Ins. Co., 203 S.C. 263,
 17 S.E. (2d) 230 (1941).

In each of these cases there was a failure on the part of a party to contribute his agreed share of the capital, and in each, despite the fact that services had been rendered or the business begun by the other partners pending that partner's contribution, it was held that the agreement to form a partnership remained executory until the contribution was made and that the party failing to contribute was not a partner and could not recover as such.

Therefore, instead of there being manifest or inescapable error in its ruling, it would appear that the ruling of the Supreme Court of Hawaii was not only supportable but clearly correct.

D. The appellant's arguments do not establish manifest error.

Appellant in his brief (pp. 15-32) argues first that there was a fiduciary relationship between appellant and appellees by reason of their agreement to become partners, and that appellees, particularly Chong Hing Tenn, fraudulently concealed from him the progress of the transfer of the Green Mill Cafe, thereby depriving him of his interest in the enterprise, and

that as a result they hold in constructive trust for him.

The answer to this is that the two courts below found against appellant on the question of whether there was a fraudulent concealment of the facts from him (R. 64, 67). Not only is there evidence of repeated demands on appellant to contribute his \$3,000 (Pet. Ex. A, R. 130, 145, 168, 244, 345) but there is also evidence that the appellant had full knowledge of the progress of the transfer (R. 270, 328, 332, 339, 340). This contention is therefore governed by the principles as to "manifest error" previously set forth.

Appellant's second argument (pp. 33-56) is that the partnership between himself and appellee was actually formed and not merely executory.

However, as has been pointed out in Section I B, the Supreme Court of Hawaii held that the agreement was one to form a partnership with appellant when he contributed his share; that he failed to do so through his own fault and not that of appellees. Evidence to support these findings was there cited. In I C we cited authorities in support of the proposition that in situations like the present the agreement is held to be executory until the contribution is made.

Moreover, in ascertaining intent, the parties' own construction of a contract is given great weight, whereas in our case here the terms of the agreement are disputed.

Moynahan Const. Co. v. Mohler, 225 Ind. 379,
75 N.E. (2d) 540 (1947);

Fowler v. Loughlin, 183 Md. 48, 36 A. (2d) 671 (1944);

Newman v. Jackson, 192 Okla. 461, 138 P. (2d) 76 (1943);

Murphy v. Nelson, *supra*.

Appellant himself construed the agreement as being executory when he failed to resign from the police force despite a department rule that anyone having an interest in a liquor department must do so (R. 195, 281, 313). As he stated:

If I had purchased an establishment I would have resigned (R. 281).

Appellant argues, however, that the condition precedent was waived by launching the business (pp. 35-41). Undoubtedly a condition precedent can be waived but waiver is a matter of intent which in so far as it was raised was held against appellant below. The fact that one or more parties contribute their shares and commence business while awaiting the contribution of another does not waive that contribution as a condition precedent.

A clear statement is found in the fourth point of the syllabus of the case of *Bird v. Hamilton* (1844) Walk. Ch. (Mich.) 361: "Where a party had failed to perform the preliminary conditions, upon the compliance with which a partnership was to be formed, and the other party to the agreement, to enable him to perform, furnished his own capital, and for a short time carried on business in the name of the proposed firm, it was held, that this was no waiver, and could not

entitle the defaulting party to the rights of a partner.”

Lipscomb v. Ballard, supra, 146 S.E. 826, 829;

Bird v. Hamilton, supra;

Westwood v. Cole, supra.

Nor is the argument (pp. 41-44) that appellant was an equitable owner in the premises by reason of the oral agreement to purchase to which he was a party any more support for his position.

In the first place, as the Supreme Court of Hawaii pointed out (R. 78), this is a suit between the joint vendees concerning their rights upon an agreement *inter sese* and not a suit against or by the vendors, so that whether appellant was an equitable owner as regards the sellers has nothing to do with his rights against the appellees which are founded upon his agreement with them, which was an entirely separate agreement (R. 111, 285).

Moreover, the oral agreement to purchase the cafe involving as it did a lease of land (Petitioner's Ex. G, R. 227) and a liquor inventory of over \$10,000 (R. 260) would give rise to no equitable ownership since it would be unenforceable under the statute of frauds (R.L.H. 1945, Secs. 8721, 9204).

Appellant argues that he acquired an ownership interest in the business by the rendition of services (pp. 44-46). The services he rendered were, however, clearly attributable to his job as manager (Pet. Ex. A, R. 130; Pet. Ex. E, R. 210, 237, 290). An agree-

ment to employ a person as a manager does not make him a joint adventurer, *Simpson v. Richmond Worsted Spinning Co.*, 128 Me. 22, 145 Atl. 250 (1929). Nothing indicates that the services allegedly rendered were to be a part of appellant's capital contribution. Again the question of whether there was a partnership depends on the agreement between the parties and the mere fact that services have been rendered does not make a man a partner.

In *Lipscomb v. Ballard*, *supra*, the court said:

Nor are we concerned here with the fact that the plaintiff contributed valuable services in the construction work at Williamson and that some of his machinery and equipment was used therein. To enforce recovery for the value of his services and the use of his property his remedy at law is plain. 146 S.E. at 829.

Accord:

Cohen v. Standard Acc. Ins. Co., *supra*;

Chancellor v. Brachman, *supra*;

Coens v. Marousis, 275 Pa. 478, 119 A. 549 (1923).

This argument is therefore also without merit.

Appellant argues (pp. 46-49) that the letter of Dr. Tong (Pet. Ex. A, R. 130) admits an existing partnership. Obviously it does not. Appellant says the elements of partnership existed (pp. 49-50). As pointed out before, the agreement was executory and appellant's default prevented his becoming a partner.

Appellant argues that the Hawaiian case of *La-throp v. Wood*, 1 Haw. 121 (1852) conflicts with the holding below in this case. It is, however, obvious that the cases are distinguishable, since in the *La-throp* case on the evidence the Supreme Court of Hawaii concluded there was an existing partnership; while in this case it decided that the agreement was executory and subject to a condition precedent. Even if there was a conflict between the principles of law announced in the cases, however, it would not constitute the basis for reversal.

That the construction is inconsistent with that which the same court placed on this statute in an earlier case proves nothing, except that the earlier decision was wrong and is now overruled.

Lord v. Territory of Hawaii, 79 F. (2d) 761, 764 (C.A. 9, 1935).

Appellant contends (pp. 56-60) that the oral decision made at the close of trial (R. 393-399) is still extant and binds the Supreme Court. As the Supreme Court recognized when this point was for the first time raised in the petition for rehearing the written decision is at variance with the oral decision (R. 79). After the trial judge had ruled for appellant (R. 393-399) he set his order aside and took the case under advisement (R. 43) and later issued a diametrically opposed written opinion (R. 43). Obviously, the trial judge's self-reversal was occasioned by a change of mind on reflection as to the credibility and weight of the evidence.

Appellant's argument on this point is the most puerile sort of quibbling and is obviously the result of the shift of counsel after the Supreme Court of Hawaii's decision (R. 69, 70).

Appellant argues (pp. 60-73) that the Supreme Court of Hawaii erred in holding that a tender by appellant was necessary. His argument is that the evidence shows that appellant was ready and willing to contribute, that the appellees made no demand, and that their conduct made tender useless. These are all questions of fact found against appellant in two courts below and the findings below are amply supported by the evidence. Section I B and Statement of Facts, *supra*. Appellant urges that the holdings of the courts below are based solely on Petitioner's Exhibit A, R. 130, which, being a document, this court is free to construe without regard to the construction below. Such a contention obviously conflicts with the manifest error rule. Moreover, the holding below was based on and is supported by ample evidence of demand (R. 145, 168, 244, 345) and other matters in addition to that exhibit (Pet. Ex. A, R. 130). He urges that the testimony of K. C. Wong that he would have lent \$2,000 unsecured to appellant is unimpeached and shows appellant's ability to have tendered. But there is ample other evidence in the record that appellant was in bad financial straits (R. 194, 317), that demand was made (Pet. Ex. A, R. 130, 145, 244, 345) and that he did not consider himself a purchaser (R. 281), all of which, together

with the undisputed fact that he did not tender, throws strong doubt on his contention of ability to pay.

Appellant in Part V of his brief (pp. 73, 78) challenges several of the findings of the Supreme Court of Hawaii.

The finding criticized in Part A is of course clearly correct. The agreement was rescinded by neither appellant nor appellees, and remained in effect until appellant's failure to meet the condition precedent of contribution terminated it. Even if the finding were wrong, however, it is difficult to see how such an error would aid appellant.

The finding criticized in Part B is a repetition of paragraph V of appellant's sworn petition. Moreover, this is ample evidence that appellees took over the business on October 1 (R. 167, 168, 241), that the deal could not be consummated until the purchase price was paid (R. 118, 138, 246) and that a down payment was made and the rest paid as soon as the liquor license was transferred (R. 253). Moreover the record shows that appellees paid \$15,000 September 30 (Res. Ex. 3, R. 376) and the remaining \$10,000 October 2 (Res. Ex. 4, R. 377) and also contains evidence of demands by appellees on appellant to put up his share (Pet. Ex. A, R. 130, 145, 168, 244, 345). Thus the finding is supported by evidence. Moreover, the October 1st date is not important to the Supreme Court's holding since it found that the time was extended till October 20.

The findings criticized in Parts C, D, E and F have all been shown heretofore in this brief to be supported by evidence.

Appellant's sixth contention (p. 78) was that it was incumbent on the Supreme Court of Hawaii to find whether the agreement was one for a partnership or a joint venture. Since in both cases petitioner would have to comply with the conditions precedent (Compare *Lipscomb v. Ballard, supra*, (partnership) with *Commercial Bank v. Welden*, 148 Cal. 601, 84 Pac. 171 (1906) (joint venture)), this argument is meritless.

Since the findings and conclusions of the Supreme Court of Hawaii are supported by the evidence and the authorities, reversible error was not committed in the decision complained of.

II.

APPELLANT WAS GUILTY OF LACHES.

A. The decision below.

A secondary ground of decision in the trial court's opinion (R. 47-48) was that appellant could not recover because of laches. The trial court stated "Equity helps the vigilant, not those who sleep on their rights." Laches was expressly pleaded in the answer (R. 19).

The Supreme Court of Hawaii did not reach this secondary ground since it affirmed on the primary

ground of appellant's nonperformance. This court could, however, pass upon this question if necessary, since, even in those cases in which (unlike the present) a lower court has the wrong reasons, it will be affirmed if it reaches the correct result.

It is clear that under the facts and on the law the trial court correctly held appellant guilty of laches.

B. The Situation.

Laches, like other equitable doctrines, is not hedged about with hard and fast requirements. It is an equitable defense sustained whenever a petitioner, knowing his rights, has delayed taking action to enforce them and, because of that delay, the respondent is so prejudiced as to make it unfair to grant petitioner's prayer.

In the case at bar, appellant was warned to put up his \$3,000 (Pet. Ex. A; R. 130, 145, 168, 244, 345). He failed to do so and was excluded from the partnership (R. 146). He knew in October 1941 that he had been excluded (Tr. pp. 299, 372), yet he made no tender then, or ever, of the share which he was to have contributed (R. 316). He knew that the appellees did not agree with his claim that he was entitled to part of the business (R. 301) but he took no action. The war came; the Green Mill was closed, and appellees had a white elephant on their hands (R. 138, 313). Still no tender from appellant. Eventually the Green Mill reopened; soon it was coining money; still appellant delayed. The war moved further into the Pacific; Hawaii became absolutely safe,

and eventually, after two and one-half years, in April 1944, appellant filed his bill (R. 309).

Despite appellant's attempt to assert that there has been no prejudice to the appellees by his delay, the fact remains that they put up all the money (Res. Ex. 2, R. 372), sustained the losses while the business was closed after the blitz (R. 138), and ran the business for two and one-half years. They weathered out the drop in value of the property after the blitz and during the time the Green Mill was closed, while appellant hung back until the business had become a gold mine, before he finally stepped forward to try to enforce his claim.

Appellant alleged in his fourth amended bill that appellees continued negotiations with him until 1943; that Dr. Tong had promised him, in January, 1943, to compensate him in respect to this claim; and that he had been lulled into a sense of security thereby (R. 15). On trial there was a complete failure of proof to support these allegations (R. 310).

C. Whether or not appellant has been guilty of laches depends upon the circumstances of the case.

The question of laches depends upon the circumstances of the case. This rule has been set down repeatedly in the Hawaiian cases.

The question of laches does not depend upon the fact that a certain definite time has elapsed, but whether under all the circumstances petitioner is chargeable with a want of diligence.

Hurst v. Kukahi, 25 Haw. 194, 196 (1919).

The cases in which the defense of laches has been involved and considered are very numerous. There is no artificial, fixed or determinate rule according to which the defense is applied. By reason of the differences in the facts, no one case becomes an exact precedent for another. So each case as it arises must be decided according to its own peculiar circumstances, taking into consideration all the elements which affect the question. . . . The matter is in the judicial discretion of the court.

In re Nelson, 26 Haw. 809, 817 (1923).

D. Laches does not require the passage of any fixed length of time.

The length of time which must elapse in order to show laches varies with the peculiar circumstances of each case and is not subject to any arbitrary rule.

Lucas v. American-Hawaiian Engineering Co.,

16 Haw. 80, 87 (1904);

Magoon v. Lord-Young Engineering Co., 22

Haw. 327 (1914).

The question of laches does not depend as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did.

Houghtailing v. De La Nux, 25 Haw. 438, 443 (1920);

Hurst v. Kukahi, *supra*.

E. Thus, in particular circumstances, relatively short delays have been held to constitute laches.

Indeed, in some cases the diligence required is measured by months rather than years. *Pollard v. Clayton*, 1 Kay & Johnson 462; *Atwood v. Small*, 6 Clark & Finelly 232. And in others a delay of two, three and four years has been held fatal. *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587; *Haywood v. Nat'l. Bank*, 96 U.S. 611; *Holgate v. Eaton*, 116 U.S. 33; *Hageman v. Bates*, 5 Colorado App. 391; *Graff v. Portland Co.*, 12 Colorado App. 106.

Patterson v. Hewitt, 195 U.S. 309, 319 (1904).

A few of the more recent cases in which a delay of about the same length as that in the case at bar has been held to constitute laches are:

Neet v. Holmes, 25 Cal. (2d) 447, 154 P. (2d) 854 (1944); —10 months

De Lamar Mines of Montana v. Mackay, 104 F. (2d) 271 (C.A. 9, 1939); —19 months

Warfield v. Anglo & London Paris National Bank, 202 Cal. 345, 260 P. 881 (1927); —36 months

Dry v. Rice, 147 Va. 331, 137 S.E. 473 (1927) —26 months.

- F. The general rule is that the trial court has discretion as to whether to apply the doctrine of laches in a particular case.

Whether a plaintiff has been guilty of laches in a particular case is a question largely within the discretion of the trial court.

Lucas v. American-Hawaiian Engineering Co., supra.

The matter is within the judicial discretion of the court.

In re Nelson, supra, at p. 817.

- G. The circumstances of this case demand an application of the doctrine.

Whenever the delay is mere neglect to seek a known remedy or to assert a known right, which defendant has denied, and is without a reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations, if an injury would otherwise be done to the defendant by reason of the plaintiff's delay.

Teachey v. Gurley, 214 N.C. 288, 199 S.E. 83, 88 (1938).

A person may not withhold his claim awaiting the financial outcome of a doubtful enterprise, and after financial success has resulted assert his interest, especially where he has thus avoided the risks of the enterprise.

Young v. Bradley, 142 F. (2d) 658, 662 (C.A. 6, 1944), Cert. den. 323 U.S. 775.

Accord:

Alexander v. Phillips Petroleum Co., 130 F. (2d) 593 (C.A. 10, 1942);

Wade v. Pettibone, 11 Ohio 57, 37 Am. Dec. 408 (1841).

The decision in *Young v. Bradley, supra*, is quite typical of the way courts have handled cases like the present one, in which the party bringing the action has let someone else risk his money, and then, when success was assured, stepped forward in the courts to claim a share.

In that case the petitioners had secured positions for the respondents as corporation officials. The respondents had bought stock and securities in another corporation for themselves. Four years later, when the securities had finally become of great value, the petitioners brought an action claiming that there had been a mutual understanding that the respondents would purchase the securities for the petitioners. And that therefore respondents held on trust. The court held that no trust had been shown and then went on to say that even if the petitioner's claims had more substantive merit they would be barred because the delay in these circumstances amounted to laches.

As in the *Young* case, we have here the elements of risk of capital on the part of the appellees and delay on the part of appellant; here, as there, appellant waited to seek his remedy until all danger to the enterprise was past. The trial court in the exer-

cise of its discretion was well justified in holding that it would be inequitable to permit appellant to recover.

CONCLUSION.

For the reasons stated, the judgment below should be affirmed.

Dated, Honolulu, Hawaii,
May 25, 1951.

Respectfully submitted,

J. GARNER ANTHONY,

THOMAS M. WADDOUPS,

FRANK D. PADGETT,

Attorneys for Appellees.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

No. 12,784

IN THE

United States Court of Appeals
For the Ninth Circuit

HUNG CHIN CHING,

Appellant,

VS.

FOOK HING TONG, CHONG HING TENN
and KUI HING TENN,

Appellees.

Upon Appeal from the Supreme Court of Hawaii.

REPLY BRIEF FOR APPELLANT.

SHIRO KASHIWA,

307 Hawaiian Trust Building, Honolulu 13, T. H.,

*Attorney for Hung Chin Ching,
Appellant.*

FILED

JUN 25 195

PAUL F. O'BRIEN

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IN THE

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REPLY BRIEF FOR APPELLANT.

ARGUMENT.

I.

**APPELLEES' REPLY BRIEF DOES NOT DISPUTE PROPOSITION
OF LAW ADVANCED IN ARGUMENT I OF APPELLANT'S
OPENING BRIEF.**

Argument I of appellant's opening brief, pages 15 to 32, advanced a proposition of law that fiduciary relationship exists when parties agree to form a partnership. (Op. Br. 16-17.) Appellees in their brief do not dispute it. But appellees seem to brush aside appellant's entire Argument I in a short paragraph on page 20 of their brief referring to R. 270, 328, 332, 339, 340. Reference is hereby made to

pages 19 to 33 inclusive of appellant's opening brief. The argument of the appellant in those pages remains unanswered.

As for the evidence of demand there is no dispute that appellee, Chong Hing Tenn, took care of the legal matters and finances. There is no evidence whatsoever that Chong Hing Tenn ever made demand upon the appellant. The only two instances of any demand by Chong Hing Tenn appear on pages 168 and 244 of the transcript. Reference to these pages are made on page 20 of the appellees' brief. The above mentioned testimony carefully examined fails to show a demand by Chong Hing Tenn on the appellant. It must be remembered that Fook Hing Tong was on Maui and appellant had to deal with Chong Hing Tenn who worked with appellant in the restaurant and *who was in charge of finances*. There was duty on Chong Hing Tenn to make a direct demand on the appellant—he never did this.

As submitted in page 65 of appellant's opening brief the letter from Fook Hing Tong to appellant stating "you have three, that is if you get the dong by then" meant it was to be paid when Chong Hing Tenn who was in charge of finances made demand. All of the other instances of demand by Fook Hing Tenn referred to by the appellees on page 20 of their brief are dubious demands after the appellant had been excluded from the partnership and furthermore after Fook Hing Tenn wrote to Ching on or about October 9th, 1941 to get out of the premises. This fact is referred to in appellant's opening brief pages 68 to 71 inclusive.

Therefore it is submitted that argument I of the appellant both on the law and facts remain clearly unanswered by appellees' reply brief. A reversal is therefore warranted on argument I of the appellant only, the law being admitted and the facts being as above indicated.

II.

CASES CITED BY APPELLEES TO MEET APPELLANT'S ARGUMENT II IN OPENING BRIEF MAY BE DIFFERENTIATED.

Argument II of the appellant's opening brief is met by appellees in pages 20 to 24 of their brief. Great emphasis is placed by the appellees in their brief on the intent of the parties. In *Barnes v. Collins*, 16 Haw. 340, it was held:

“But by the intention of the parties is meant, not what they call or consider the relation into which they enter, but what the relation is in legal effect.”

The cases cited by the appellees may be differentiated. The only close case cited is that of *Bird v. Hamilton*, Walker's Chancery (Mich. 1844), 361. It is interesting that the Court at the end of the decision remarked at page 373:

“The present case is not, I confess, without its difficulties.”

It is submitted that had there been present in that case evidence of double-crossing by a person in fiduciary capacity as displayed by Chong Hing Tenn is this case the Michigan Court would have reached a

contrary result. In all of the other cases cited by the appellees the element of breach of good faith by and between parties in fiduciary relationship was missing and in all cases, unequivocal demands were made.

III.

ARGUMENT III OF APPELLANT'S OPENING BRIEF IS NOT "QUIBBLING".

Appellees' statement on page 24 of their brief that the written and oral decisions were diametrically opposite certainly needs correction. The written decision is based on the defense of a lack of tender. It is submitted that the oral decision and the written decision are not diametrically opposite up to the point of tender. The written decision is silent as to appellant's being "squeezed out" but silence is not opposition.

Appellees refer to appellant's argument III as being childish—"puerile". Perhaps so because the fundamental error may be discovered by even a child. The cases cited by the appellant in support of his argument remain completely unanswered by the appellees. In other words the appellant's position is correct as far as the law is concerned. The judges in the decisions cited by the appellant thought it important to differentiate between fact findings and orders or judgments. Appellees seem to think differently.

IV.

**APPELLEES FAILED TO ANSWER MOST IMPORTANT POINT IN
ARGUMENT IV OF APPELLANT'S OPENING BRIEF.**

Appellees do not dispute in their brief the correctness of the decision in *H. Johnson v. T. P. Tinsdale*, 4 Haw. 605, cited in appellant's argument IV to the effect that tender is unnecessary when it is reasonably certain that the offer will be refused. The admitted testimony of Dr. Tong (Fook Hing Tong) was that he kicked out appellant as of October 9th, 1941. Reference is hereby made to pages 68 to 71 of the appellant's opening brief.

Appellees are no doubt embarrassed by this testimony of Dr. Tong. Not even an attempt to explain the situation is made by the appellees in their reply brief.

Here again may it not be asked whether a failure on the appellees' part to reply to an obviously sound and fundamental point of law is an acknowledgment of the correctness of the appellant's position?

V.**APPELLANT WAS NOT GUILTY OF LACHES.**

Appellees on page 27 of their reply brief state that the trial Court stated "Equity helps the vigilant, not those who sleep on their rights", and cite this to support their position that appellant did not promptly bring suit. The trial Court made that statement only with relation to the defense of tender. (See Tr. p. 48.)

Both of the lower Courts were hesitant to adopt the proposition advanced by the appellees in their brief that appellant should have started his suit sooner. In fact in the oral decision the trial Court held that there was no laches. (See Tr. p. 398.)

Appellees' counsel seem to forget that after December 7th, 1941 it was not until February 8th, 1943 that the Territorial Courts were released from Military Control. See *Ex parte Duncan* (9 C.C.A.) 146 F. (2d) 576 at page 581 for a full discussion of this factual matter. Appellant obtained counsel in October or November of 1943. (See Tr. p. 311.) In other words in spite of the war situation and in spite of the fact that he was a police officer with much to do during those war years he sought counsel in a fairly short time after the Courts were opened—in about seven months.

It is submitted that where neither the trial Court nor the Supreme Court of Hawaii found the appellant guilty of laches this Court should hesitate to do so especially where both of the lower Courts were well aware of conditions in Hawaii during the war years and they refused to find appellant guilty of laches.

VI.

**THIS COURT MAY REVIEW AND REVERSE DECISIONS OF
SUPREME COURT OF HAWAII AS TO LAW AND TO FACTS
IN THIS CASE.**

It is respectfully submitted that this Honorable Court may review and should reverse the decision of

the Supreme Court of Hawaii as to the law applicable in this case and also as to conclusion of facts reached from evidence presented.

Appellees contend in their brief (pages 13-15) that this Court should not overturn the findings of the Supreme Court of Hawaii as to applicable law and conclusions of facts and give as reason therefor the so-called "manifest error" rule and cite as authority for said rule the *Waialua Agricultural Co. v. Christian*, 305 U.S. 91 case. Though it is true that in the *Waialua Agricultural Co.* case the Supreme Court of the United States did lay down the rule that even in cases involving general law the rule that this Court should not disturb the decision of the Supreme Court of Hawaii unless there is manifest error should also be applicable, it is submitted that it is limited to cases where the general law is closely related to or partake of the nature of local law. In said *Waialua Agricultural Co. v. Christian*, supra, at pp. 108-109, the Supreme Court stated:

"Review of its Decisions.—While the determinations made by the territorial court upon the validity of instruments executed by incompetents, the interpretation of the contract of an incompetent, and the adjustments of equities concerning improvements after cancellation of a conveyance, partake of general law, as well as of local law, we see no reason for not applying the rule as to local matters to *these circumstances* * * *"
(Emphasis ours.)

Should the rule laid down in the *Waialua Agricultural Co.* case be interpreted to mean to include all general

law of whatever nature, it would in effect emasculate the jurisdiction of this Court relating to the Territory of Hawaii conferred by Congress. (28 U.S.C.A., Secs. 1293 and 1294 (5).) The general laws of fiduciary relations, tender and launching of partnership applicable in this case as contended in appellant's opening brief are not such general laws partaking of local character.

It is further respectfully submitted that though the rules of law applicable in this case be determined to be such general law partaking of a local character, the laws as determined by the Supreme Court of Hawaii to be applicable in this case are manifestly erroneous to warrant this Honorable Court to reverse the decision of the Supreme Court of Hawaii. We refer to arguments presented in appellant's opening brief relating to the fiduciary relation, the existence in fact of a partnership, the effect of the oral decision and tender and to arguments presented herein in Arguments Nos. I, II, III and IV. See also *Ah Lung v. Ah Leong* (1928) (C.C.A. 9), 27 F. (2d) 582 and *Chun Ngit Ngan v. Prudential Insurance Co.* (1925), (C.C.A. 9), 9 F. (2d) 340.

Appellant reiterates herein the fact that neither the Supreme Court of Hawaii nor the trial Court did even consider the law of fiduciary relations in reaching their decision. (Appellant's Op. Br. p. 16.) A determination of this Court, it may be said, under the above fact is not reversal by this Court of applicable law as determined by the Supreme Court of Hawaii and therefore would not contravene the rule established in the *Waialua Agricultural Co.* case.

CONCLUSION.

It is therefore submitted that the decision and order of the Supreme Court of Hawaii be reversed and an appropriate order of this Court be entered granting appellant his relief prayed for.

Dated, Honolulu, Hawaii,
June 25, 1951.

Respectfully submitted,

SHIRO KASHIWA,

*Attorney for Hung Chin Ching,
Appellant.*

United States
Court of Appeals
for the Ninth Circuit.

FARMERS INSURANCE EXCHANGE, Also
Known as FARMERS AUTOMOBILE
INTER INSURANCE EXCHANGE,

Appellant,

vs.

LOUISE K. HOLM,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Oregon.

FILED
MAY 11 1951
JAMES H. O'BRIEN
CLERK

United States
Court of Appeals
for the Ninth Circuit.

FARMERS INSURANCE EXCHANGE, Also
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Transcript of Record

Appeal from the United States District Court,
for the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

KOERNER, YOUNG, McCOLLOCH, DEZEN-
DORF,

CLARENCE J. YOUNG, and WILLIAM D.
CAMPBELL,

Pacific Building,
Portland, Oregon,
Attorneys for Appellant.

NATHAN WEINSTEIN,
1739 NE 42nd Avenue.

LEO LEVENSON,
Spalding Bldg.,
Portland, Oregon,
Attorneys for Appellee.

In the United States District Court
for the District of Oregon
Civil No. 5251

LOUISE K. HOLM,

Plaintiff,

vs.

FARMERS INSURANCE EXCHANGE, Also
Known as FARMERS AUTOMOBILE IN-
TER INSURANCE EXCHANGE,

Defendant.

PETITION FOR REMOVAL

Farmers Insurance Exchange for the purpose of presenting this petition shows that heretofore and on or about the 9th day of January, 1950, Louise K. Holm, as plaintiff, brought this action against Farmers Insurance Exchange as defendant in the Circuit Court of the State of Oregon for the County of Multnomah.

Farmers Insurance Exchange at the time of the commencement of said action was and now is a reciprocal inter-insurance exchange created and existing under and by virtue of the laws of the State of California, and at all of said times was and now is a citizen and resident of that state and a non-resident of the State of Oregon.

Plaintiff Louise K. Holm at the time of the commencement of said action, ever since has been and now is a citizen, resident and inhabitant of the State of Oregon, and is not a citizen, resident or inhabitant of the State of California.

This action is one of a civil nature in which there is a controversy between citizens of different states, and the amount in controversy, exclusive of interests and costs, exceeds the sum of \$3,000.00.

Attached hereto as Exhibit "A" and "B" respectively are copies of summons and complaint served upon Farmers Insurance Exchange in said action in said Circuit Court.

KOERNER, YOUNG, SWETT
& McCOLLOCH,
CLARENCE J. YOUNG,

/s/ JOHN GORDON GEARIN,
Attorneys for Defendant.

State of Oregon,
County of Multnomah—ss.

I, John Gordon Gearin, being first duly sworn, depose and say that I am one of attorneys for Farmers Insurance Exchange, defendant in the above-entitled action and that the foregoing petition for removal is true as I verily believe.

/s/ JOHN GORDON GEARIN.

Subscribed and sworn to before me this 26th day of January, 1950.

[Seal] /s/ MABEL H. COOK,
Notary Public for Oregon.

My Commission expires: Dec. 26, 1953.

Exhibit "A"

In the Circuit Court of the State of Oregon for
the County of Multnomah

LOUISE K. HOLM,

Plaintiff,

vs.

FARMERS INSURANCE EXCHANGE, Also
Known as FARMERS AUTOMOBILE IN-
TER INSURANCE EXCHANGE,

Defendant.

SUMMONS

To Farmers Insurance Exchange, also known as
Farmers Automobile Inter Insurance Exchange
Defendant.

In the Name of the State of Oregon: You are hereby required to appear and answer the Complaint filed against you in the above-entitled cause within ten days from the date of service of this Summons upon you, if served within this County; or if served within any other County of this State, then within twenty days from the date of the service of this Summons upon you; and if you fail so to answer, for want thereof, the Plaintiff will take judgment against you for the sum of \$10,000.00, together with the additional sum of \$708.45, together with the additional sum of \$64.95, as costs, together with interest thereon at the rate of 6% per annum from the 2nd day of November, 1949,

until paid, together with the additional sum of \$5,000.00 as reasonable attorney's fees herein.

/s/ NATHAN WEINSTEIN,
Attorney for Plaintiff.

Exhibit "B"

In the Circuit Court of the State of Oregon
for the County of Multnomah
No.

LOUISE K. HOLM,

Plaintiff,

vs.

FARMERS INSURANCE EXCHANGE, Also
Known as FARMERS AUTOMOBILE IN-
TER INSURANCE EXCHANGE,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendant complains and alleges as follows:

I.

That defendant is an insurance exchange company duly organized and existing under and by virtue of the laws of the State of California and duly licensed to do business in the State of Oregon under and by virtue of Sections 101-1301 to 1316 inclusive O.C.L.A. and was known as, prior to May 1, 1947, the Farmers Automobile Inter Insurance Exchange and that the said Farmers Insurance Exchange is

engaged in the general liability indemnity insurance business in the State of Oregon.

II.

That on the 27th day of May, 1938, the defendant did solicit and sell to one A. Von Borstel a certain automobile liability insurance policy being Farmers Automobile Inter Insurance Exchange policy #2098402, a copy of which policy is hereto attached marked "Exhibit A" and by this reference made a part of this complaint as though fully set forth herein.

III.

That on the 11th day of May, 1942, the said Farmers Insurance Exchange did issue an endorsement on the said policy which transferred the coverage thereon from a certain 1936 Plymouth sedan to a certain 1940 Plymouth sedan, bearing serial #10983736, motor #P10-185961, copy of which endorsement is hereto attached marked "Exhibit B" and by this reference made a part hereof as though fully set forth herein.

IV.

That the said policy has at all time herein mentioned been in full force and effect.

V.

That on about the 29th day of June, 1948, the said A. Von Borstel did give and transfer to one Helen L. Sondenaa, his daughter, the said 1940 Plymouth automobile and did at that time transfer to his daughter, the said Helen L. Sondenaa, the

insurance contract hereinabove referred to and hereto attached, marked "Exhibit A".

VI.

That prior to the time of the transfer of the said automobile and the said insurance policy from the said A. Von Borstel to the said Helen L. Sondenaa, the said A. Von Borstel approached the defendant herein and advised the said defendant that the said automobile was being transferred to the said Helen L. Sondenaa and that at that said time and place the said A. Von Borstel requested that the consent of the defendant be given to the said assignment of the said policy, at which time and place the said A. Von Borstel was advised by the said defendant that in view of the fact that the automobile was to remain in the family and that transfer was being made to a close relative of the said A. Von Borstel, to wit: his daughter, that no formal assignment was required and that the consent of the defendant to any assignment was not required and that the said A. Von Borstel and his said daughter and persons driving the said automobile with the consent and permission of the said A. Von Borstel or his daughter, Helen L. Sondenaa, would be protected under the terms and provisions of the said policy.

VII.

That relying upon the statement made by defendant to the said A. Von Borstel the consent of the defendant to the assignment of the insurance policy was not obtained although the defendant had full

knowledge of the transfer of the automobile and the assignment of the policy.

VIII.

That on the 3rd day of October, 1948, the plaintiff herein was injured on the Mt. Hood Loop Highway in Multnomah County, Oregon, by the automobile described in the endorsement hereto attached, marked "Exhibit B" and insured by the insurance policy hereto attached, marked "Exhibit A," which said automobile at said time and place was operated by Elmer N. Sondenaar with the consent and permission and at the request of the said Helen L. Sondenaar and that thereafter, on the 2nd day of November, 1949, in the Circuit Court of the State of Oregon for the County of Multnomah in a case entitled "Louise Holm, plaintiff vs. Elmer N. Sondenaar et al." being #185-807, the plaintiff herein recovered judgment against the said Elmer N. Sondenaar for the sum of \$12,000, together with the additional sum of \$708.45 special damages, and the sum of \$64.95, costs and disbursements, which said judgment was entered in the said cause and which said judgment has not been paid nor has any part thereof been paid. That thereafter executions were issued against the property of the said Elmer N. Sondenaar and that the same have been returned nulla bone and that more than thirty days have passed since the rendition of the said judgment and that neither the same nor any part thereof has been paid.

IX.

That forthwith after the happening of the said accident on the 3rd day of October, 1948, Helen L. Sondenaa and Elmer N. Sondenaa, the operator of the said automobile did advise the defendant of the happening of the said accident and of the loss thereby occasioned and that the defendant did on or before October 20, 1948, make an investigation of the facts and circumstances and that thereafter the defendant did bill and receive from A. Von Borstel an additional premium on the said policy which the said A. Von Borstel did pay to the defendant on about the 6th day of November, 1948, and that in May of 1949, the defendant did demand from the said A. Von Borstel another premium on the said policy which the said A. Von Borstel refused to pay and that the premium paid to the defendant and accepted by the defendant has never been returned to the said A. Von Borstel and has never been offered to be repaid to the said A. Von Borstel as of the filing of this action.

X.

That the said A. Von Borstel, Helen L. Sondenaa and Elmer N. Sondenaa did tender to the defendant defense of the action of Louise Holm vs. Elmer N. Sondenaa et al, #185-807, which said tender of defense was refused by the said defendant on or about the 27th day of December, 1948, and that the said defendant has disclaimed any and all liability on the said policy and has refused to comply with any of the terms therein stated.

XI.

That by reason of the acts and conduct of the defendant as above set forth the defendant is estopped from asserting that the consent to the assignment of the said insurance policy was required and is further estopped from asserting that the defendant has no liability under the said policy.

XII.

That more than six months have elapsed from the notification to the defendant of the claim herein and of the action entitled "Louise Holm vs. Elmer N. Sondenaa et al." and that the claim has not been paid nor has the defendant attempted to settle the same or taken any position other than that the defendant has absolutely no liability on the said policy and that by reason thereof the plaintiff is entitled to recover in addition to the face amount of the policy herein such sum as may be reasonable as attorney's fees and that the sum of \$5,000.00 is a reasonable amount as attorney's fees hereunder.

XIII.

That in the said action of Holm vs. Sondenaa et al., the plaintiff recovered the sum of \$708.45, as special damages for medical expenses and recovered the sum of \$64.95 as costs, which said sums the defendant, under and by virtue of the terms of the said insurance policy has agreed to pay.

Wherefore, plaintiff demands judgment against the defendant for the sum of \$10,000.00, together with the additional sum of \$708.45, together with the additional sum of \$64.95 as costs together with

interest thereon at the rate of 6% per annum from the 2nd day of November, 1949, until paid, together with the additional sum of \$5,000.00 as reasonable attorney's fees herein.

/s/ NATHAN WEINSTEIN,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed January 26, 1950.

[Title of District Court and Cause.]

ORDER

Upon application of defendant and for good cause shown,

It Is Hereby Ordered that defendant have to and including the 15th day of February, 1950, within which to file its answer herein.

Dated at Portland, Oregon, this 27th day of January, 1950.

/s/ JAMES ALGER FEE,
Judge.

[Endorsed]: Filed January 30, 1950.

[Title of District Court and Cause.]

ANSWER

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant denies each and every allegation contained in plaintiff's complaint and the whole thereof, except it admits:

I.

It is a reciprocal inter-insurance exchange existing under the laws of the State of California and duly licensed and admitted to do business in the State of Oregon.

II.

Prior to the 3rd day of October, 1948, defendant had issued to A. Von Borstel a certain automobile liability Policy No. 2098402.

III.

Defendant admits that sometime prior to the 3rd day of October, 1948, said A. Von Borstel transferred the automobile described in said policy.

IV.

On or about the 3rd day of October, 1948, there was an accident on Mt. Hood Loop Highway in Multnomah County, Oregon between the automobile which at one time had been the property of said A. Von Borstel and an automobile in which plaintiff

was riding, as a result of which plaintiff sustained some injury.

V.

Thereafter plaintiff recovered judgment against Elmer N. Sondenaar in the sum of \$12,000.00, together with special damages and costs and disbursements.

Wherefore having fully answered plaintiff's complaint defendant prays that plaintiff take nothing thereby.

KOERNER, YOUNG, SWETT
& McCOLLOCH,
CLARENCE J. YOUNG,

/s/ JOHN GORDON GEARIN,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed February 14, 1950.

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY
DEFENDANT

To the Court: The Court will understand that each subdivision of any instruction hereinafter requested is to be deemed a separate and complete instruction.

IV.

B. You are not to consider any controversy between the defendant Exchange and A. Von Borstel.

D. Before there can be an estoppel in this case against the defendant, the plaintiff must first prove by a preponderance of the satisfactory evidence all of the following, which constitute elements of estoppel.

(1) Agent Lawrence must have been authorized to make the statements which are claimed by the plaintiff.

(2) Agent Lawrence must have made a false representation or concealment of material facts.

(3) Agent Lawrence must have made the representation or statements with actual or constructive knowledge of the true facts.

(4) The party to whom the statements were made, that is, the assured A. Von Borstel must have been without knowledge or means of knowing the true facts.

(5) Agent Lawrence must have made the statements with the intention that the statements be relied upon and the party to whom the statements were made, that is the assured A. Von Borstel must have relied upon the statements of Agent Lawrence to his prejudice.

V.

If you find from the evidence in this case that no representation was made by the defendant to Helen L. Sondenaar, then an essential element of estoppel would be lacking and your verdict would have to be for the defendant.

VII.

A. There can be no estoppel where the conduct of the person asserting the estoppel is the result of such persons fault or negligence.

B. In other words, if the failure on the part of Helen L. Sondenaa to have the policy formally assigned to her was the result of her own fault or negligence rather than the statements made by agent Lawrence, then in that event you must find your verdict in favor of defendant.

VIII.

You are instructed that if under the circumstances of this case a reasonably prudent person would have made further inquiry as to the location and identity of an agent of the Exchange, and would have had the policy formally assigned within a reasonable period of time after the transfer of title, and you further find that Helen L. Sondenaa did not act as such reasonably prudent person would have acted, then in that event the plaintiff can not recover and your verdict would have to be in favor of the defendant.

IX.

Before you can find that the Exchange was estopped to deny that the policy was transferred to Helen L. Sondenaa based upon the retention of the premium paid by A. Von Borstel after the accident, there must appear from the satisfactory evidence that the Exchange knew of the transfer of title prior to the time the premiums were received.

XI.

A. The party setting up estoppel must have acted in reliance on the conduct or the representations of defendant. Helen L. Sondenaa must have had knowledge of the conduct or representations and must not only have been destitute of knowledge of the validity of the assignment without the consent of the defendant endorsed upon the policy but must also have been without convenient or ready means of acquiring knowledge of the validity of the assignment without the company's consent endorsed upon the policy. (To the Court: See *American Bank v. Port Orford Cedar Products Co.*, 140 Ore., 138, 12 P. (2d) 1014.)

B. A party relying upon an estoppel must exercise reasonable diligence to acquire knowledge of the facts and if a party conducts himself with careless indifference to means of information reasonably at hand, the doctrine of estoppel can not be invoked.

C. You are instructed in this connection that one of the provisions written on the face of the insurance policy required an endorsement of the consent of the defendant on the policy before the assignment of any interest under that policy would be valid.

XII.

A. Under the terms of 7 O.C.L.A., Sections 101-1301 to 101-1316, inclusive, which sections regulate reciprocal insurance in the State of Oregon, there can be no contract of insurance until such time as the applicant for insurance has become a subscriber to the Exchange.

B. You are instructed that under these circumstances Helen L. Sondenaa could not have become an insured of defendant Farmers Insurance Exchange until after she became a member of the defendant reciprocal exchange.

C. Since Helen L. Sondenaa never became a member of the defendant's Exchange, she was not the insured under this policy of insurance and defendant is therefore not liable for any judgment obtained against her husband.

XIV.

If you find that A. Von Borstel misunderstood the statement of Agent Lawrence, then in that event the plaintiff can not recover in this case.

[Title of District Court and Cause.]

VERDICT FOR PLAINTIFF

We, the jury, being duly sworn and empaneled to hear the above-entitled action find our verdict in favor of the plaintiff Louise K. Holm and against the defendants Farmers Insurance Exchange, also known as Farmers Automobile Inter Insurance Exchange, and assess the amount in the sum of \$10,000.00 with interest thereon at the rate of 6% per annum from November 2nd, 1949.

/s/ VICTOR R. BRUCK,
Foreman.

[Endorsed]: Filed June 17, 1950.

[Title of District Court and Cause.]

MEMORANDUM OPINION

The question reserved at the trial was whether retention of the premium and filling the financial responsibility statement constituted ratification. I think taken together they do. The sequence is:

(1) Lawrence led Von Borstel to believe, and through him his daughter, that, since the car transfer was in the family, the insurance remained good—so the jury found;

(2) The company was advised of this through its investigation of the accident;

(3) After being so advised, the company (a) continued to retain the premium paid after the accident, and (b) assumed responsibility for the accident under the Financial Responsibility Act.

I think (2) and (3) constitute ratification of (1).

Dated at Portland, Oregon, this 18th day of October, 1950.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed October 18, 1950.

[Title of District Court and Cause.]

ORDER

This matter having come on regularly for trial before the Hon. Claude McCulloch, Judge of the

above-entitled Court, on the 16th day of June, 1950, plaintiff appearing in person and by her attorneys, W. J. Prendergast, Jr. and Nathan Weinstein and Leo Levenson; defendants appearing by their attorneys, Koerner, Young, McColloch and Dezendorf, by Clarence J. Young and John Gearin; a jury having been duly impaneled and sworn to try the above-entitled cause, and the trial having proceeded, and the parties having rested, and the defendant having moved the Court for a directed verdict in their favor, and the plaintiff having moved the Court for a directed verdict in plaintiff's favor; and the Court having taken said motions under advisement and having submitted the matter to the jury on the issues raised by the pleadings, and the jury having rendered its verdict in favor of the plaintiff, and thereafter defendants having moved the Court for a judgment notwithstanding said verdict, and the Court having taken said motion under advisement, and the parties having filed briefs thereon, and the Court having duly considered the same and being fully advised in the matter,

It Is Therefore Ordered that the motion for judgment notwithstanding the verdict be, and the same is hereby denied, and that judgment shall be entered as hereinafter determined by the Court.

Dated this 28th day of October, 1950.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed October 28, 1950.

In the United States District Court
for the District of Oregon
Civil No. 5251

LOUISE K. HOLM,

Plaintiff,

vs.

FARMERS INSURANCE EXCHANGE, also
Known as FARMERS AUTOMOBILE
INTER INSURANCE EXCHANGE,

Defendant.

JUDGMENT

This matter coming on regularly for hearing before the Honorable Claude McColloch, Judge of the above-entitled Court, on the 16th day of June, 1950, plaintiff appearing in person and by and through her attorneys, W. J. Prendergast, Jr., Leo Levenson and Nathan Weinstein, defendant appearing by and through its attorneys, Koerner, Young, McColloch and Dezendorf, by and through Clarence J. Young and John Gearin, witnesses on the part of the plaintiff and defendant having been sworn and examined, defendant having moved the Court for judgment for a directed verdict in favor of the defendant, which said motion was by the Court denied and thereafter the plaintiff having moved for a judgment in favor of the plaintiff by directed verdict, which said motion having thereafter been denied, the jury thereupon having heard the arguments of counsel and the instructions of the Court, and the jury having

considered their verdict and having returned a verdict in favor of the plaintiff and against the defendant, and thereafter defendant having moved for a judgment notwithstanding the verdict, which said motion was by the Court denied.

Now, Therefore, It is Ordered and Adjudged that the plaintiff have and recover from and of the defendant the sum of \$10,000.00, together with the additional sum of \$708.45 as and for medical expenses of the plaintiff herein, ~~together with the additional sum of \$708.45 as and for medical expenses of the plaintiff herein,~~ together with the additional sum of \$64.95, together with interest on the sum of \$12,773.40, at the rate of six per cent per annum until paid from the 2nd day of Nov., 1949, together with the additional sum of \$1,500.00 as attorneys' fees herein, together with plaintiff's costs and disbursements herein taxed at \$.....

Dated at Portland, Multnomah County, Oregon, this 31 day of October, 1950.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed October 31, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Farmers Insurance Exchange, also known as Farmers Automobile Inter Insurance Exchange, defendant above named, hereby appeals to the United States Court of Ap-

peals for the Ninth Circuit from the final judgment entered in this action on the 31st day of October, 1950, and from the whole thereof.

Dated at Portland, Oregon, this 13th day of November, 1950.

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,
JOHN GORDON GEARIN,
/s/ WILLIAM D. CAMPBELL,
Attorneys for Appellants.

State of Oregon,
County of Multnomah—ss.

Service of the foregoing Notice of Appeal by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this day of November, 1950.

.....
Attorneys for Plaintiff.

[Endorsed]: Filed November 20, 1950.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents that we, Farmers Insurance Exchange, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto Louise K. Holm in the full and just sum of \$15,000.00 to be paid to the said Louise K. Holm, her executors, administrators or assigns, to which payment well and truly to be

made we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 21st day of November, in the year of our Lord One Thousand Nine Hundred and Fifty.

Whereas lately at the United States District Court for the District of Oregon in a suit pending in said Court between Louise K. Holm, plaintiff and Farmers Insurance Exchange, defendant, a judgment was rendered against the said Farmers Insurance Exchange, and the said Farmers Insurance Exchange having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suit in which notice was given that appeal was taken to the United States Court of Appeals for the Ninth Circuit.

Now, the condition of the above obligation is such that if the said Farmers Insurance Exchange shall prosecute its appeal to effect and satisfy the judgment in full, together with costs and interests and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interests and damages as the appellate court may adjudge and award if it fails to make its appeal good, then the above obligation to be void, otherwise to remain in full force and effect.

FARMERS INSURANCE
EXCHANGE,

By /s/ WILLIAM D. CAMPBELL,
One of Its Attorneys,
Principal.

[Seal] FIDELITY & DEPOSIT
COMPANY OF MARYLAND,

By /s/ CLARENCE D. PORTER,
Attorney-in-Fact,
Surety.

Countersigned:

By /s/ CLARENCE D. PORTER,
Resident Agent.

ORDER

The foregoing Bond is hereby approved and is to stand as a supersedeas until the final determination of the appeal.

Nov. 22, 1950.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed November 22, 1950.

[Title of District Court and Cause.]

DEFENDANT'S STATEMENT OF POINTS TO
BE RELIED UPON ON APPEAL

Farmers Insurance Exchange, defendant above named and appellant in the appeal of the above-entitled action to the United States Court of Appeals for the Ninth Circuit, intends upon its appeal to rely upon the following points:

I.

The court erred in admitting in evidence testimony of witness Elmer Sondenaa of what A. von Borstel told him that Agent Lawrence had told von Borstel (Tr. 55).

II.

The court erred in admitting in evidence testimony of the witness Elmer Sondenaa as to the statements of adjuster Patterson (Tr. 62).

III.

The court erred in admitting in evidence the testimony of the witness Elmer Sondenaa relating to the payment of attorney's fees in the action entitled Holm v. Sondenaa (Tr. 65).

IV.

The court erred in admitting in evidence testimony of witness Helen Sondenaa of what A. von Borstel told her that Agent Lawrence had told von Borstel (Tr. 82).

V.

The court erred in overruling defendant's motion for an order directing a verdict against plaintiff (Tr. 142-149, and the order of the court entered thereon).

VI.

The court erred in failing to submit to the jury the factual question of whether or not defendant's acceptance and retention of a premium paid on or about November 8, 1948, was made with full knowledge of all the facts (Tr. 149, 154-156).

VII.

The court erred in giving to the jury as a part of its instructions an erroneous version of the testimony given at the trial as to what was said between Agent Lawrence and the assured, von Borstel (Tr. 150, 153).

VIII.

The court erred in failing to submit to the jury defendant's version of this conversation in addition to the version given by plaintiff (Tr. 150, 153).

IX.

The court erred in failing to give defendant's requested instructions hereinafter quoted, each of which was prefaced by the following request:

“To the Court: The Court will understand that each subdivision of any instruction hereinafter requested is to be deemed a separate and complete instruction.”

X.

The court erred in failing to give defendant's requested instruction IV B:

“You are not to consider any controversy between the defendant Exchange and A. von Borstel.”

XI.

The court erred in failing to give defendant's requested instruction IV D:

“Before there can be an estoppel in this case against the defendant, the plaintiff must first prove by a preponderance of the satisfactory

evidence all of the following, which constitute elements of estoppel.

“(1) Agent Lawrence must have been authorized to make the statements which are claimed by the plaintiff.

“(2) Agent Lawrence must have made a false representation or concealment of material facts.

“(3) Agent Lawrence must have made the representation or statements with actual or constructive knowledge of the true facts.

“(4) The party to whom the statements were made, that is, the assured A. Von Borstel must have been without knowledge or means of knowing the true facts.

“(5) Agent Lawrence must have made the statements with the intention that the statements be relied upon and the party to whom the statements were made, that is the assured A. Von Borstel must have relied upon the statements of Agent Lawrence to his prejudice.”

XII.

The court erred in failing to give defendant's requested instruction V:

“If you find from the evidence in this case that no representation was made by the defendant to Helen L. Sondenaa, then an essential element of estoppel would be lacking and your verdict would have to be for the defendant.”

XIII.

The court erred in failing to give defendant's requested instruction VII:

"A. There can be no estoppel where the conduct of the person asserting the estoppel is the result of such person's fault or negligence.

"B. In other words, if the failure on the part of Helen L. Sondenaar to have the policy formally assigned to her was the result of her own fault or negligence rather than the statements made by Agent Lawrence, then in that event you must find your verdict in favor of defendant."

XIV.

The court erred in failing to give defendant's requested instruction VIII:

"You are instructed that if under the circumstances of this case a reasonably prudent person would have made further inquiry as to the location and identity of an agent of the Exchange, and would have had the policy formally assigned within a reasonable period of time after the transfer of title, and you further find that Helen L. Sondenaar did not act as such reasonably prudent person would have acted, then in that event the plaintiff can not recover and your verdict would have to be in favor of the defendant."

XV.

The court erred in failing to give defendant's requested instruction IX:

“Before you can find that the Exchange was estopped to deny that the policy was transferred to Helen L. Sondenaa based upon the retention of the premium paid by A. Von Borstel after the accident, there must appear from the satisfactory evidence that the Exchange knew of the transfer of title prior to the time the premiums were received.”

XVI.

The court erred in failing to give defendant's requested instruction XI:

“A. The party setting up estoppel must have acted in reliance on the conduct or the representations of defendant. Helen L. Sondenaa must have had knowledge of the conduct or representations and must not only have been destitute of knowledge of the validity of the assignment without the consent of the defendant endorsed upon the policy but must also have been without convenient or ready means of acquiring knowledge of the validity of the assignment without the company's consent endorsed upon the policy. (To the Court: See *American Bank v. Port Orford Cedar Products Co.*, 140 Ore. 138, 12 P. (2d) 1014.)

“B. A party relying upon an estoppel must exercise reasonable diligence to acquire knowledge of the facts and if a party conducts himself with careless indifference to means of information reasonably at hand, the doctrine of estoppel can not be invoked.

“C. You are instructed in this connection that one of the provisions written on the face of the insurance policy required an endorsement of the consent of the defendant on the policy before the assignment of any interest under that policy would be valid.”

XVII.

The Court erred in failing to give defendant's requested instruction XII:

“A. Under the terms of 7 O.C.L.A., Sections 101-1301 to 101-1316, inclusive, which sections regulate reciprocal insurance in the State of Oregon, there can be no contract of insurance until such time as the applicant for insurance has become a subscriber to the Exchange.

“B. You are instructed that under these circumstances Helen L. Sondenaar could not have become an insured of defendant Farmers Insurance Exchange until after she became a member of the defendant reciprocal exchange.

“C. Since Helen L. Sondenaar never became a member of the defendant's Exchange, she was not the insured under this policy of insurance and defendant is therefore not liable for any judgment obtained against her husband.”

XVIII.

The court erred in failing to give defendant's requested instruction XIV:

“If you find that A. Von Borstel misunderstood the statements of agent Lawrence, then

in that event the plaintiff can not recover in this case.”

XIX.

The court erred in overruling defendant's motion for judgment non obstante veredicto. (See defendant's motion and court's order thereon, in record.)

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,
CLARENCE J. YOUNG,

/s/ WILLIAM D. CAMPBELL,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 13, 1950.

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF CONTENTS OF RECORD

Farmers Insurance Exchange, defendant above named and appellant in the appeal of the above-entitled action to the United States Court of Appeals of the Ninth Circuit, hereby designates the following portions of the record, proceedings and evidence upon the trial to be contained in the record on appeal.

Pleadings.

Verdict.

Judgment entered September 30, 1950.

All of the Exhibits.

Defendant's requested instructions Nos. IV B and D, V, VII, VIII, IX, XI, XII, and XIV.

The whole of the transcript of proceedings upon the trial.

The Court's ruling on defendant's motion for directed verdict.

The Court's ruling on plaintiff's motion for directed verdict.

Defendant's motion for judgment non obstante veredicto.

The Court's ruling thereon.

The Court's memorandum opinion.

Defendant's notice of appeal and supersedeas bond.

This designation.

Defendant's statement of points to be relied upon at the appeal.

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,
CLARENCE J. YOUNG,

/s/ WILLIAM D. CAMPBELL,
Attorneys for Farmers
Insurance Exchange.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 13, 1950.

[Title of District Court and Cause.]

ORDER

The motion of defendant Farmers Insurance Exchange for an order authorizing the transmission of the original exhibits in this case to the court to which appeal has been taken coming on at this time regularly to be heard and the Court being fully advised in the premises,

It Is Ordered that the Clerk of this Court transmit all of the exhibits introduced in evidence upon the trial of the above-entitled action with the record on appeal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit for the use of the Judges thereof, said exhibits to be by him preserved and returned to the Clerk of this Court upon disposition of the appeal.

Dated this 20th day of December, 1950.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed December 20, 1950.

[Title of District Court and Cause.]

DOCKET ENTRIES

1950

Jan. 26—Filed petition for removal from Multnomah County.

Jan. 26—Filed bond on removal.

Jan. 26—Filed notice of removal.

1950

Jan. 27—Entered order allowing deft. twenty days to answer.

Feb. 14—Filed answer.

Feb. 24—Filed plaintiff's demand for jury trial.

May 12—Entered order setting for trial on June 13, 1950, 10 a.m.

May 25—Issued subpoena and handed to Attorney Gearin.

May 24—Filed notice to take deposition of Elmer N. Sondenaa, et al. at Toledo, Oregon.

May 24—Filed notice to take deposition of A. Von Borstel at The Dalles.

May 25—Filed petition Atty. Gearin for subpoena duces tecum Sondenaa, et al.

May 25—Filed and entered order for subpoena duces tecum, Elmer N. Sondenaa, et al.

May 25—Issued subpoena duces tecum to marshal.

June 5—Filed deposition of Helen L. Sondenaa for defendant.

June 5—Filed deposition of Elmer N. Sondenaa for defendant.

June 7—Filed deposition of A. Von Borstel for defendant.

May 31—Filed subpoena with marshal's return.

May 31—Filed subpoena (def.) with marshal's return.

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- June 16—Entered order admitting Nathan Weinstein specially for purposes of this case, order excluding witnesses from courtroom, record of impaneling jury and trial.
- June 16—Filed petition for subpoena duces tecum.
- June 16—Filed and entered order for subpoena duces tecum.
- June 17—Record of jury trial and motions of both plaintiff and defendant for directed verdict and order reserving said motions and record of verdict.
- June 17—Filed verdict for ptff. for \$10,000 with int. at 6% from 11/2/49.
- June 17—Entered order for meals.
- June 22—Filed defendant's motion for order setting aside verdict of the jury.
- June 21—Record of further hearing on motion of deft. for directed verdict in its favor argued and reserved.
- Sept. 2—Filed deft.'s opening brief.
- Sept. 5—Record of further hearing on motion of deft. for order setting aside verdict and order allowing ptff. 2 weeks to file brief.
- Sept. 26—Filed ptffs. brief on motion for judgment N. O. V.
- Oct. 13—Filed deft's reply brief on motion for judgment N. W. V.

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Oct. 18—Filed memorandum opinion.

Oct. 28—Filed and entered order denying deft.'s motion for judgment notwithstanding verdict.

Oct. 30—Record of hearing on judgment and order reserving.

Oct. 31—Filed and entered judgment for plaintiff for \$10,000, together with additional sum of \$64.95 with interest on the sum of \$12,773.40 at the rate of 6% per annum until paid from the 2nd day of Nov., 1949, and \$1500 atty. fees.

Oct. 31—Filed cost bill of plaintiff.

Oct. 31—Entered judgment in Lien Docket.

Nov. 17—Filed notice to tax costs. Costs taxed at \$132.60.

Nov. 20—Filed notice of appeal by defendant.

Nov. 20—Copy of notice of appeal mailed to W. J. Prendergast.

Nov. 22—Filed supersedeas bond.

Dec. 13—Filed transcript of proceedings in duplicate, dated June 16, 17 and October 30, 1950.

Dec. 13—Filed defendant's designation of record on appeal.

Dec. 13—File defendant's statement of points.

Dec. 20—Filed and entered order to send original exhibits.

United States District Court
District of Oregon
Civil No. 5251

LOUIS K. HOLM,

Plaintiff,

vs.

FARMERS INSURANCE EXCHANGE, also
Known as FARMERS AUTOMOBILE IN-
TER INSURANCE EXCHANGE,

Defendant.

Portland, Oregon, June 16, 1950, A.M.

Before: Honorable Claude McColloch,
Judge, and a jury.

Appearances:

MR. WILLIAM J. PRENDERGAST,
MR. LEO LEVENSON and
MR. NATHAN WEINSTEIN,
Attorneys for Plaintiff.

MR. CLARENCE J. YOUNG, and
MR. JOHN GORDON GEARIN,
(Koerner, Young, McColloch & Dezendorf),
Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS

The Court: I think I need a little more information about this. I looked over the file last night. I have asked the jury to stay outside for a little while.

Mr. Prendergast: I wonder if it would be proper at this time, your Honor, for me to move the admission of Mr. Nathan Weinstein for the purpose of the trial of this case. I will try the case. Mr. Weinstein is the attorney who tried the case for damages in the State Court and he has an application before this Court for admission, but has not been admitted as yet.

The Court: Is there any objection?

Mr. Gearin: No, your Honor.

The Court: Motion allowed.

I suppose I might as well lead off. Is this customary procedure, after judgment is obtained? I don't remember having that kind of a case before. Are you bringing an independent suit?

Mr. Prendergast: Yes, your Honor.

The Court: You claim there was insurance covering this loss and they deny it?

Mr. Prendergast: That is right, sir. It is an issue of coverage, as I understand it. The action was brought under the theory of estoppel, or sometimes called waiver. Whatever you call it, "waiver" or "estoppel," the effect is estoppel. There are many authorities on the subject.

The Court: Have you pleaded that?

Mr. Prendergast: Yes. We have pleaded estoppel.

The Court: Did you plead waiver?

Mr. Prendergast: Not as a waiver, your Honor. We pleaded it as an estoppel. As I say, some text writers call it "waiver"; it is sometimes called an "estoppel." I think the Court could deem the term

“estoppel” to be a better term, the company [2*] being estopped to deny recovery under the facts.

The Court: You have got some stuff in here that sounds like ratification to me, that they accepted the premium after the loss.

Mr. Prendergast: It is the plaintiff’s contention here, your Honor, that the agent of the company was informed of the transfer of this automobile. It was inquired of this agent as to what would be necessary to transfer this policy from the father to the daughter. It is the plaintiff’s contention that the agent informed the father that, being a transfer within the family, the coverage would be extended to the automobile but that the daughter would sometime “sign” this policy.

The Court: I have read all the papers. I know about that. That wasn’t what I was talking about.

Mr. Gearin: I do not want to interrupt at this time, but——

The Court: You are not interrupting. I want to hear you.

Mr. Gearin: First, your Honor, I would like to suggest that the witnesses be excused from the courtroom until such time as they are called.

The Court: All right. Take them out. Don’t allow them to mingle with the jurors. Put them somewhere else.

(Witnesses excused from the courtroom.)

Mr. Gearin: In this case, if your Honor please, the issue, as I see it, is as to whether or not the company should be estopped to deny coverage because of alleged statements made by [3] an agent

* Page numbering appearing at top of page of original Reporter’s Transcript of Record.

prior to the time of the loss. That is the only question, as I see it. The question of estoppel by payment of the premium I think is not in the case.

We have taken the depositions of all the parties. The company did not know of the transfer and was not advised of the transfer of the automobile at the time the insured made a premature payment on the policy; the policy was not due—the payment was not due when they made the payment, and at that time neither the insured nor the driver, nor anyone connected with them, had advised the company of the transfer of the automobile.

That is a little different story, your Honor. This Inter Insurance Exchange setup, as governed by the Oregon statutes, provides you have got to be a member of the group before you can participate. The assured lived in Kent, Oregon.

The Court: You don't need to cover that. I have read all the deposition testimony.

Mr. Gearin: This is our situation, your Honor: The issue, as I see it, is what the agent said and what is the significance, or consequence, of his statement, if any.

The Court: I do not agree with you. With the ordinary policy of insurance on an automobile—every agent in the United States will tell you this—when you pay the premium the car is being insured. That is the basis on which the policy is sold—the car is being insured. Short of somebody stealing your car, whoever is driving it with your authority is covered by the insurance. [4]

Mr. Gearin: I submit, your Honor, the liability

of the defendant in this case is governed not by what the common policy is but what this policy of insurance is, under the Oregon statutes regarding inter-insurance exchanges.

The Court: Don't start shouting at me. The father of the girl owned the car?

Mr. Gearin: Yes.

The Court: The insurance was in his name?

Mr. Gearin: Yes; that is right.

The Court: He had written insurance on it by the representative of the company at The Dalles. He gave the car to his daughter. You may dispute these facts, of course. He gave the car to his daughter. He says that he talked to the district representative of the company at The Dalles and that he told him that it would be better to make the technical transfer down where she lived; and he handed the daughter the insurance policy and thought in his own mind, "Well, all right."

The company representative at The Dalles told him he had better make the technical transfer, whatever was necessary, down where she lived at Toledo, and, as the transfer was from father to daughter, then she could recover. That is the father's testimony in his deposition.

Then she came back to Toledo and the baby that she was carrying at the time got that off her mind. Meanwhile, down there they had made some inquiry as to who represented the company, [5] but it did not pursue it to a final conclusion; in other words, she didn't do anything as far as getting the papers transferred was concerned. She went back with

her husband to her father's home in Kent, to show off the baby, I guess, and coming back they had this accident, out here east of Gresham.

Then she and her husband were sued. Her husband was driving. She and the baby were riding in the car. Mr. Weinstein got a judgment for this plaintiff, Louise K. Holm, who was in the car at the time of the accident. The company declined to defend the case because it did not have coverage. They employed some other lawyers here to defend them. It was contested on the merits, wasn't it?

Mr. Weinstein: Yes, your Honor.

The Court: But before that Mr. Patterson, representing the company in some capacity, called on them at their home in Toledo, investigating the accident, and he got these papers, whatever they were, including the policy. No? He didn't get the policy?

Mr. Prendergast: No.

The Court: What were the papers he got?

Mr. Weinstein: Letters from myself and another attorney.

The Court: Which Mr. Patterson was that, the man who was a lawyer here?

Mr. Gearin: No, your Honor. It was Mr. William Patterson of Eugene, Oregon.

The Court: Eugene, Oregon? [6]

Mr. Gearin: Yes.

The Court: What was his capacity?

Mr. Gearin: Adjuster.

The Court: Adjuster?

Mr. Gearin: Yes.

The Court: They claim—and of course I guess you will dispute it—that he told them the company would defend but, anyhow, the company did not defend, and they got other lawyers, and they were defeated on the merits of the case. Then dates become important.

Mr. Gearin: Yes, your Honor. On July 29, 1948, title to the car was transferred by the Secretary of State from the assured to his daughter, Helen.

The Court: Those are not the dates I want.

Mr. Gearin: The date of the accident?

The Court: Wait a minute. I will tell you the dates I want.

Mr. Gearin: I am sorry, your Honor.

The Court: The insurance was prepaid to when?

Mr. Gearin: To November 18, 1948.

The Court: The accident was when?

Mr. Gearin: October 3, 1948.

The Court: When did the company decline liability?

Mr. Gearin: The company declined liability by letter dated December 27, 1948.

The Court: You say the insurance was prepaid to October 3rd? [7]

Mr. Gearin: No, at the time of the transfer of the automobile the insurance was paid up to November 18th.

The Court: The accident was on October 3rd?

Mr. Gearin: That is correct.

The Court: Prepaid. On November 18th he paid another premium, didn't he?

Mr. Gearin: No, he paid the premium by a check dated November 5th, which I think was received in the Portland office or cashed on either the 6th or 7th.

The Court: Anyhow, it was cashed?

Mr. Gearin: That is correct.

The Court: That paid it up until when?

Mr. Gearin: Six months from November 18, 1948. That would be May 18, 1949.

The Court: That has never been refunded?

Mr. Gearin: It has not, your Honor.

The Court: That was after the accident. You claim they got no notice at the time the accident occurred?

Mr. Gearin: That is correct, neither from von Borstel nor Mrs. Sondenaa or anybody else advising the exchange that title had been transferred. It was not until the 10th of November, 1948, three or four days after we received the premium, that we were advised by Mr. Weinstein of the fact that claim was being made under the von Borstel policy.

The Court: Why didn't you return the [8] premium?

Mr. Gearin: For the reason that at that time the insured, von Borstel, did not advise us and, furthermore, the policy of insurance provided coverage with regard to other cars which he himself might have driven; in other words, he had protection to a limited extent up to May 18th, because the policy provided that he would have coverage on driving other cars.

The Court: The accident was October 3rd?

Mr. Gearin: That is correct, your Honor.

The Court: When did the company first get notice of the accident?

Mr. Gearin: The company first got notice of that, I think, on the 11th or 12th of October, by letter from Mr. Sondenaa.

The Court: I don't care how they got it.

Mr. Gearin: May I make a statement in that regard?

The Court: You may pretty soon.

Mr. Gearin: All right.

The Court: But, having notice of the accident, they accepted the further payment of premium on November 5th.

Mr. Gearin: That is not correct, your Honor.

The Court: All right. Correct me, then.

Mr. Gearin: That is not correct, your Honor, because at the time we accepted it we knew of an accident Mr. Sondenaa was in but the notice he gave the company did not state what policy was involved, other than a number. He did not give Mr. von Borstel's name. We got his letter, and we didn't know who he was. We had [9] no way of telling what the situation was.

He wrote a letter and said, "I have been in an accident. My name is Elmer Sondenaa." We checked our files and we had no assured named Elmer Sondenaa.

The Court: What did you do about it?

Mr. Gearin: We didn't do anything because he wasn't an assured. He wrote a letter. He said,

“There has been an accident and somebody hurt. My name is Elmer Sondenaa.”

The Court: Did he give a description of the car?

Mr. Gearin: That I do not know, your Honor. The letter is one of the exhibits here. He gave a policy number at the time, which was checked immediately upon receipt of the letter. It describes the automobile—no. I beg your pardon—the other automobile that was involved. We wrote to Mr. Moon, a former agent at Wasco who sold the policy ten years previously to Mr. von Borstel, and gave him the policy number.

I will tell you what happened there. The company immediately checked the list of assureds and Mr. Elmer Sondenaa was not insured. He gave an address at Toledo, Oregon. We checked the policy number and found it was issued to Mr. A. von Borstel at Kent, Oregon, in Eastern Oregon. There appeared to be no connection between the two. It was a short time thereafter that we received a call from Mr. Weinstein, and we informed him we did not have the car insured to Mr. Sondenaa, by that name, in other words, but that it might be with the State Farm.

Mr. Weinstein then talked with the State Farm and found from their agent at Toledo that the Sondenaa's had been in there with their policy, and it was issued to von Borstel, and that information was given to us by Mr. Weinstein on the 10th of November.

On that very day we went out and took a statement from the Sondenaa's, and three days later we

took the statement of von Borstel. The accident was never investigated before, and the first thing we did, upon notice of this accident, or knew that it was in any way tied up with one of our assureds was that within 24 hours we obtained the statements from them and found out for the first time that the premium was prepaid in advance by the assured——

The Court: What estoppel do you claim?

Mr. Prendergast: The facts are a little different, your Honor, than Counsel has stated, I think, so far as the company not knowing about this.

The estoppel we claim is this: In July von Borstel, having had a policy in force for some ten years, one Moon being the agent at Kent, some 60 miles from The Dalles, went into The Dalles and went to the defendant's agent there, who was the general agent for the company in The Dalles, and said, "I am giving this automobile to my daughter. I have bought another automobile that is protected under another automobile insurance policy that has nothing to do with the Farmers. I am giving [11] my car to my daughter and I want to be sure that she is covered."

The agent said, "If it is a transaction within the family, the automobile is covered, but she should 'sign' the policy and it is preferable that she do it at Toledo, where she lives." We maintain, therefore, the company then knew about this transfer of this automobile.

Immediately after the accident happened, the next day, Sondenaa wrote to Moon, who had been

the agent for the company, and told him he had had an accident with this same automobile that was covered by the policy, and gave the policy number and described the accident.

The company knew then about the accident.

Then, not prepaying it, but upon receipt of notice of premium due, von Borstel sent in his check to the Farmer Insurance Exchange, covering not only this automobile but the truck that he was operating as a wheat farmer, and not any other automobile, because every vehicle that he had was covered by a separate insurance policy. They accepted that premium, and not only did they have notice in their *Portland here*, just as they had notice of the accident, but they knew that this car had been given to the daughter.

The Court: Mark all your documents now.

Mr. Gearin: The Branch Claims Manager, who will not be a witness, is here, and I think it is proper for him to be here at this time at the counsel table.

The Court: Yes. [12]

Mr. Prendergast: I believe we are ready to mark the plaintiff's exhibits.

The Court: Don't take a lot of time. Has each seen the other's exhibits?

Mr. Gearin: I have not seen the plaintiff's, your Honor.

The Court: Look at those, then.

Mr. Gearin: We have seen all of these, your Honor.

The Court: Mark the exhibits for the plaintiff, then.

Plaintiff's Exhibits for Identification

Number:	Description
3	Copy of Judgment in the Circuit Court of the State of Oregon for the County of Multnomah in cause entitled "Louise Holm, Plaintiff, vs. Elmer N. Sondenaa and Helen L. Sondenaa, husband and wife, and A. von Borstel, Defendants," No. 185-807.
4	Policy No. 2098402, Farmers Automobile Inter-Insurance Exchange issued to A. von Borstel, together with endorsements thereon.
5	Check dated November 5, 1948, payable to Farmers Insurance Exchange, in amount \$22.42, signed Amandus von Borstel.
6	Carbon copy of letter dated December 31, 1948, Farmers Insurance Exchange by James N. Tomlin to Elmer N. Sondenaa and Helen L. Sondenaa, Toledo, Oregon.
7	Letter dated December 30, 1948, Farmers Insurance [13] Exchange, to Brown & Van Vactor, Attorneys-at-Law, The Dalles, Oregon.
8	Letter dated December 27, 1948, Farmers Exchange, to Mr. A. von Borstel, Kent, Oregon.
9	Letter dated December 28, 1948, Farmers Insurance Exchange, to Mr. Elmer Sondenaa, Toledo, Oregon.

Defendant's Exhibits for Identification

Number:	Description
10	Telephone Directory, Corvallis and vicinity, December, 1947.
11	Telephone Directory, Corvallis and vicinity, December, 1948.
12	Handwritten statement, dated November 10, 1948, Toledo, Oregon, signed by Elmer N. Sondenaa.
13	Handwritten statement, dated Kent, Oregon, November 13, 1948, signed by A. von Borstel.
14	Report of Accident signed by A. von Borstel.
15	Report of Accident, dated October 5, 1948, signed by Elmer N. Sondenaa, Toledo, Oregon, addressed to Farmers Automobile Insurance, George B. Moon, Wasco, Oregon.
16	Statement signed by Helen L. Sondenaa, dated Toledo, Oregon, November 18, 1948.
17	Statement signed by Helen L. Sondenaa, Toledo, Oregon, [14] November 18, 1948.
18	Letter dated November 16, 1948, Nathan Weinstein, Attorney-at-Law, to Elmer and Helen L. Sondenaa.
19	Memorandum signed by Amandus A. von Borstel, requesting change of Policy No. 2098402 to Plymouth sedan, with copy of acknowledgment of Farmers Automobile Inter Insurance Exchange attached.

Number :	Description
20	Letter dated November 15, 1948, Nathan Weinstein, Attorney-at-Law to Farmers Automobile Inter Insurance Exchange.
21	Certified copy of Certificate of Title issued to A. von Borstel, covering Plymouth sedan, and copy of Assignment of Title by registered and legal owners.
22	Copy of Interoffice Memorandum dated October 8, 1948, from Bill Lawrence to Northwest Branch, Farmers Automobile Insurance Exchange.
23	Form of Agent's Report, Farmers Insurance Exchange.
24	Certified copy of pleadings in case of Louise Holm, Plaintiff, vs. Elmer N. Sondenaa and Helen L. Sondenaa, husband and wife, and A. von Borstel, No. 185-807, Circuit Court of the State of Oregon for Multnomah County.
25	Deposition of Elmer N. Sondenaa, taken on behalf of [15] defendant May 31, 1950.
26	Deposition of Helen L. Sondenaa, taken on behalf of defendant May 31, 1950.
27	Deposition of A. von Borstel, taken on behalf of defendant June 2, 1950.

The Court: Do you want a jury?

Mr. Prendergast: Yes, please, your Honor.

The Court: This is the kind of a case, I believe, that will take two days to try with a jury. That is plain to me, so plan on today and tomorrow. I

will tell you both this is not the kind of a case evidently for a jury. I am pretty sure in my own mind I will be the one who will decide this case rather than the jury.

Mr. Prendergast: I wonder if I may confer with Counsel. The reason I say that is that we have made a request for a jury trial, but may I confer a moment with Counsel?

The Court: Yes. Do you want a jury?

Mr. Gearin: May we confer, your Honor?

The Court: Certainly. I don't care whether you have a jury or not.

(Intermission.)

Mr. Gearin: I had originally made a demand for a trial by [16] jury. The defendant at this time is willing to proceed to trial without a jury. We are willing to waive a jury, your Honor.

Mr. Prendergast: The plaintiff would like to have a jury.

The Court: All right. Keep the witnesses outside.

(Recess.)

The Court: Call a jury.

(Jury was thereupon duly empaneled and sworn to try the cause.)

(Open Statement by Mr. Prendergast, Attorney for Plaintiff.)

The Court: Ladies and Gentlemen, because of the fact I have to leave early and I have no way

of knowing how extended Mr. Gearin's opening remarks will be, I am going to recess now, so he may speak without breaking into his statement. Come back at 1:30.

Meanwhile, don't discuss this case or permit it to be discussed in your presence. Don't do that until the case is finally submitted to you for deliberation. You may go now. The others will remain sitting while the jury leaves the room. Come back at half-past one, please.

(Thereupon a recess was taken until 1:30 p.m.) [17]

(Court reconvened at 1:30 o'clock p.m., Friday, June 16, 1950, pursuant to recess.)

(Opening statement by Mr. Gearin, of Attorneys for Defendant.)

Plaintiff's Testimony

AMANDUS A. VON BORSTEL

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Prendergast:

Q. Your name is A. von Borstel or Amandus von Borstel? A. Yes.

Q. Where do you reside?

A. Kent, Oregon.

(Testimony of Amandus A. von Borstel.)

Q. Where is Kent?

A. About 70 miles from The Dalles, south of The Dalles, on Highway 97.

Q. What is your occupation, sir?

A. Farmer.

Q. How long have you lived in Kent?

A. My entire life.

Q. How is that, please?

A. Fifty-three years.

Q. Have you been farming at Kent for all fifty-three years? [18]

A. No, I took over the farm in 1920, so I have been there for about thirty years on the farm. Before that I was farming with my father.

Q. You are the father of Mrs. Sondenaa, is that correct?

A. That is correct.

Q. What is Mrs. Sondenaa's first name?

A. Helen.

Q. What is her husband's name?

A. Elmer.

Q. When was your daughter married?

A. 1946 or 1947. I am not so certain of the date.

Q. Did she live up there at Kent with you until her marriage?

A. Part of the time; she had attended school at Oregon State College for part of two years.

Q. Have you had any business dealings with the Farmers Insurance Exchange or the Farmers Inter Insurance, Mr. von Borstel?

A. I had a policy with the Farmers Exchange since 1938.

(Testimony of Amandus A. von Borstel.)

Mr. Prendergast: May we have the witness handed Plaintiff's Exhibit No. 4 for Identification?

(Plaintiff's Exhibit No. 4 for Identification handed to the witness.)

Q. Mr. von Borstel, you now have in your hand an exhibit marked Plaintiff's Exhibit No. 4. Can you tell us what that exhibit is?

A. If you will pardon me, I will put on my glasses because it is a little difficult for me to see this print. [19]

Q. I just want you to identify the exhibit, Mr. von Borstel. Tell us what the exhibit consists of.

A. Well, that is the policy on my automobile.

Q. Is that the policy of which you spoke when you spoke of having a policy with Farmers since 1938? A. It is.

Q. Can you give us, for identification purposes, the number of that policy? Do you have it there?

A. 2098402. The policy number is 2098402. Pardon me. I will have to get on my glasses again to read that. 2098402.

Q. That policy describes a motor vehicle, does it not? A. Yes, a 1936 Plymouth sedan.

Q. Would you look at the other papers attached thereto, the endorsements that have been attached to that policy, and testify as to whether or not there is any endorsement showing a change of automobile on there?

A. Yes, there is a rider attached here, showing

(Testimony of Amandus A. von Borstel.)

that the policy was transferred from a 1936 Plymouth to a 1940 Plymouth.

Q. In what year?

A. The fourth month of '42.

Q. You owned a 1936. Was the 1936 model the first car or the 1938? A. It was a 1936 car.

Q. You also owned a 1940 car?

A. Yes. [20]

Q. At the time of the marriage of your daughter, what automobile did you own, Mr. von Borstel?

A. I owned this 1936 Plymouth. I also owned a 1948 Dodge.

Q. Was that a 1948 Dodge automobile?

A. A Dodge sedan.

Q. Did you have any other motor vehicles, including trucks or pickups, that you had insured with the Farmers Inter Insurance Exchange?

A. I had one truck.

Q. Was that covered by a separate policy?

A. By a separate policy, **yes**.

Q. Over what period of time did you carry that policy on the truck?

A. If I recollect, it was in the fall of 1942 that I took out that policy.

Q. So you were paying two different premiums to the Farmers Insurance, one on this particular policy that you now hold in your hand, naming the 1936 Plymouth, and which was changed later to a 1940 Plymouth, and you were also paying premiums on the policy covering the operation of the

(Testimony of Amandus A. von Borstel.)

truck, is that correct? A. That is correct.

Q. From whom did you purchase these policies?

A. I purchased this policy here from George Moon in Wasco.

Q. Who was George Moon? [21]

A. George Moon?

Q. Who was George Moon?

A. He is a dealer, a hardware dealer in the town of Wasco, Oregon.

Q. Was he representing the Farmers Insurance Exchange at the time you purchased the policy?

A. He was at that particular time.

Q. Did you continue to pay premiums on this policy which you now hold in your hand, and which is marked Plaintiff's Exhibit No. 4, from 1938 up through 1948, Mr. von Borstel?

A. Yes, I did.

Q. How were those premiums paid? Were they paid annually or semi-annually?

A. Semi-annually.

Q. What method did you use to pay them, usually? A. By check.

Q. Would you receive a notice from the company of the premium being due?

A. Premium notices were mailed to me prior to the due date.

Q. What was the due date on that policy, do you remember?

A. I think one was the 18th of May and the other one was the 26th day of May.

Q. I mean this particular policy, Exhibit No. 4?

(Testimony of Amandus A. von Borstel.)

A. That would be the 18th of May and the 18th day of November.

Q. Each six months you would pay half the premium, is that correct? [22]

A. Yes, that is correct.

Q. During the time, from the issuance of the policy in May, 1938, until October of 1948, did you ever make any claims on your policy, the policy marked Exhibit No. 4, against the Farmers Insurance Exchange whatsoever?

Mr. Gearin: We would like to object to that, your Honor, on the ground that it is incompetent, irrelevant and immaterial to this controversy before the Court.

The Court: Sustained.

Q. (By Mr. Prendergast): Did you have any business transactions with the Farmers Insurance Exchange in relation to this particular policy, marked Exhibit 4, in those ten years, other than the payment of premiums?

A. Only the transfer of the policy from the 1936 car to the 1940 and for a change of motor in the 1940 car, putting in a new motor. I put in a new motor and I had to send in the new motor number to the company, so it would cover that same car with a new motor.

Q. You spoke, Mr. von Borstel, of owning a Dodge sedan in 1948. When did you acquire the Dodge sedan?

A. Either in June or the first part of July, 1948.

(Testimony of Amandus A. von Borstel.)

Q. This Dodge sedan was covered by insurance?

A. Yes. I had it insured the moment that the title was transferred to me. [23]

Q. With whom was that covered?

Mr. Gearin: Objected to, your Honor, on the ground it has no bearing on the present controversy.

The Court: Sustained.

Mr. Prendergast: I will withdraw that question.

Q. Was that car insured with Farmers?

Mr. Gearin: The same objection.

The Court: Let him answer Yes or No. Was it insured with Farmers? A. No.

Q. (By Mr. Prendergast): When you purchased the Dodge automobile, which you have just testified you insured as soon as you acquired it, with some other company than Farmers, what did you do with the 1940 Plymouth?

A. I gave it to my daughter.

Q. Before you gave it to your daughter, what, if anything, did you do with the car?

A. I took it in to The Dalles to have a ring job and check the motor, recondition it so that the car would be in good running order when I turned it over to my daughter.

Q. Prior to your taking it in for some work on the motor, did you notify your daughter you were going to give her this car? A. Yes, we did.

Q. She was married at that time?

A. Yes. [24]

Q. Where was she living?

A. She was living at Toledo, Oregon.

(Testimony of Amandus A. von Borstel.)

Q. With her husband, Mr. Elmer Sondenaa?

A. Yes.

Mr. Prendergast: If the Court please, we have a very important matter that we would like to discuss with the Court for a minute or two. It will facilitate the trial, and inasmuch as the Court indicated that we might have to continue through tomorrow, it being a holiday in other courts, it is very necessary that we confer with your Honor now.

The Court: Is it about subpoenaing some papers?

Mr. Prendergast: Yes.

The Court: You don't need to talk to me about it. The Clerk has handed me an order which I will sign, if the other side has no objection. Have you filed a motion here?

Mr. Prendergast: Yes, we have a petition for a subpoena duces tecum.

The Court: If you have got an order based on the petition, bring it up here.

Mr. Prendergast: The Clerk handed that up to your Honor.

Q. I forgot whether I asked you this or not. Did you notify your daughter prior to that time that you were going to give her the car?

A. I did.

Q. Had you made any arrangements as to the date on which you [25] were going to deliver the car to her? Did you notify her as to the date on which you were going to give it to her?

A. No. We just told her we were getting our Dodge car, and for them to come up and get the car.

(Testimony of Amandus A. von Borstel.)

Q. Was it your intention, and did you make it as a gift to her or did she pay for it?

A. I made it as a gift.

Q. On the occasion of the car being at the repair shop or the garage in The Dalles for these repairs, did you go in to The Dalles?

A. I was in The Dalles, yes.

Q. Could you give us the approximate time that you were in The Dalles about this work on this Plymouth?

A. It was right around the 1st of July.

Q. On that occasion did you contact or talk to anybody representing the Farmers Inter Insurance Exchange?

A. Yes, inasmuch as I contemplated turning title to this car to my daughter, I stopped in at the Farmers Insurance Exchange office and contacted Mr. Lawrence, their representative in The Dalles.

Q. In relation to this garage where the car was being repaired, would you tell the jury where this office of Farmers was.

A. There is a second-hand or used car lot on Fourth and——

Q. In relation to the garage, how far away was the office?

A. At the southeast corner, across from the [26] garage.

Q. In other words, in coming out of the garage you could see the Farmers Insurance Exchange office?

A. That is correct.

(Testimony of Amandus A. von Borstel.)

Q. Did you know Mr. Lawrence or had you ever talked to him prior to that time?

A. No, I didn't know the gentleman.

Q. Did you go over to the office, Mr. von Borstel?

A. I went to that office.

Q. Why did you go over to that office?

A. I went over to see what was necessary to transfer that insurance policy to my daughter.

Q. With whom did you speak?

A. With Bill Lawrence.

Q. How long was your conversation with him? How long did it take?

A. Just a matter of a few minutes.

Q. Will you tell the jury in substance what your conversation was with Mr. Lawrence?

A. I asked Mr. Lawrence what was necessary to do in order to transfer this policy from my name to my daughter's, and he instructed me that the policy would have to be signed by my daughter.

Q. Did he say anything else?

A. Then he asked where my daughter resided, and I told him, and he said she would have to sign that policy with him or with their [27] nearest representative at Toledo.

Q. Was there any conversation about the coverage in the meantime?

A. Yes, he told me since these premiums—being a transaction within the family, as long as the premiums were paid on this policy that the policy would cover.

(Testimony of Amandus A. von Borstel.)

Q. Did you inform him you were transferring the car to your daughter? A. I did.

Q. Did he ask you anything about whether the premium had been paid?

A. That I don't recall.

Q. Did he offer to supply you with any blanks or forms? A. Not that I remember.

Q. After talking to Mr. Lawrence, the discussion you have just repeated, was there any further discussion with him?

A. No, none whatsoever.

Q. Did you then impart that information to your daughter? A. I did.

Q. When did you deliver the car to her?

A. It was sometime in July.

Q. If title was transferred on the books of the Secretary of State of Oregon on the 29th of July, showing that application was made on the 25th of July, would that refresh your memory as to the approximate date you delivered the car to your daughter? [28]

A. Well, no, I couldn't remember the approximate date.

Q. How did your daughter get the car from you, Mr. von Borstel?

A. Her and her husband come up and got the car.

Q. What was her physical condition at that time? A. She was pregnant at the time.

Q. When did she have her baby, Mr. von Borstel? A. Sometime in September.

(Testimony of Amandus A. von Borstel.)

Q. At the time of the delivery of this 1940 Plymouth to your daughter, when she came up with her husband to get it, did you deliver her this insurance policy—— A. I did.

Q. ——that is the policy you hold in your hand, marked Exhibit No. 4—— A. Yes.

Q. Did you explain to her at that time the conversation you had with Mr. Lawrence?

A. Yes, that she would have to have this policy transferred at her first convenience, and I also told her Mr. Lawrence told me as long as the premiums were paid on this policy, being that it was a transaction within the family, this policy would cover.

Q. Would cover whom?

A. Would cover my son-in-law and my daughter.

Q. Did you after that receive any knowledge or information that this automobile, the 1940 Plymouth, had been involved in an accident, Mr. von Borstel? [29] A. Yes, I did.

Q. When, approximately?

A. If I remember correctly, they come up to see us and they looked at the car about the 3rd of October.

Q. When did you hear about the accident?

A. The next or the following morning.

Q. That would be the 4th of October?

A. Yes.

Q. That would be what year? A. 1948.

Q. After that, Mr. von Borstel, did you receive

(Testimony of Amandus A. von Borstel.)

a premium notice from the Farmers Inter Insurance Exchange?

A. Yes, I received my premium notice around the latter part of October.

Q. Did you thereupon pay the Farmers Inter Insurance Exchange in the same manner you had theretofore paid for ten years?

A. Yes, I paid by check.

Q. Exhibit No. 5 is handed to you, Mr. von Borstel; you now hold in your hand Exhibit No. 5. Can you identify the exhibit?

A. Yes. That is the check I paid the two policy premium notices with, due on the 18th and 25th.

Q. What is the date of that check?

A. The date is November 5, 1948.

Q. Would you reverse the check and tell us who endorsed the same? [30]

A. "Pay to the order of The First National Bank of Portland, November 8, 1948, Farmers Insurance Exchange, Farmers Underwriters Association, Attorney-in-Fact."

Q. Does that check bear any identification or markings that would show what it was for?

A. Yes, I wrote here the policy numbers, 2098402 and 2584151, and underscored that for the simple reason——

Mr. Gearin: Just a minute: I object to that, your Honor. The document speaks for itself. Go ahead. Tell why you underscored it.

A. For the simple reason that I got both pre-

(Testimony of Amandus A. von Borstel.)

mium notices close to the same time and I would be paying the two premiums with one check.

Mr. Gearin: If your Honor please, at this time I understand that there has been an order having something to do in connection with a subpoena duces tecum.

The Court: Don't be in a hurry. Wait until the Clerk gets down there to you. He hasn't got there yet. Go ahead with your examination. Move along, Mr. Prendergast.

Q. (By Mr. Prendergast): Along with the check, Exhibit No. 5 which you now hold in your hand, did you return the premium notices to the company with your check? A. I did.

Q. That was your usual practice in paying premiums over these ten years? [31] A. Yes.

Mr. Prendergast: If the Court please, at this time the plaintiff would like to offer in evidence the exhibit marked No. 4 and the exhibit marked No. 5.

Mr. Gearin: We have no objection, your Honor.

The Court: Admitted.

(Policy No. 2098402, Farmers Automobile Inter Insurance Exchange issued to A. von Borstel, with endorsements thereon, heretofore marked for identification, was thereupon received in evidence as Plaintiff's Exhibit No. 4; and

(Check dated November 5, 1948, payable to Farmers Insurance Exchange, in amount \$22.42, signed "Amandus von Borstel," hereto-

(Testimony of Amandus A. von Borstel.)

fore marked for identification, was thereupon received in evidence as Plaintiff's Exhibit No. 5.)

Q. (By Mr. Prendergast): In relation to Exhibit No. 5 which is the check you held in your hand a minute ago, where did you send that check?

A. To the Portland office.

Q. Was that the usual place you sent your premiums? A. Yes.

Q. In sending the premium notice did the company furnish you with a return envelope for the premium? A. Yes. [32]

Q. And you enclosed the check and the premium notice in the envelope and sent it back to Portland?

A. I did.

Q. Why did you pay the premium on the policy on this particular car, the 1940 Plymouth?

Mr. Gearin: Object to that question, your Honor, on the ground and for the reason the testimony is that he paid it. We do not object to that, that he apparently paid it, but the reason for it, I think, is immaterial.

The Court: Overruled. Why did you pay it?

A. I knew the policy was due and they were badly hard up for cash, so to keep this car covered I paid the premium, for the agent told me to send them the premium notice and the insurance would be good and I therefore paid it and thought it was paid.

Q. (By Mr. Prendergast): As to the payment

(Testimony of Amandus A. von Borstel.)

of the premium on the truck, you still had the truck? . A. I still had the truck.

Q. So all the motor vehicles you actually had then were covered by insurance? A. Yes, sir.

Q. Mr. von Borstel, do you know of your own knowledge to what date this check, in paying the premium on the policy which is in evidence here as a part of this case—do you know to what date that paid the premium in full?

A. To May 18th and 25th, 1949. [33]

Q. May 18th, you mean, on the Plymouth?

A. Yes.

Q. And to May 25th, you mean, on the truck?

A. On the truck, to the 25th of May, 1949.

Q. But in relation to the 1940 Plymouth, you had given to your daughter this check, marked Exhibit No. 5 here, paid the premium in full up until May 18, 1949, is that correct?

A. That is correct.

Q. Has that money ever been refunded to you?

A. It has not.

Q. Has anybody of the Farmers Insurance Exchange or anybody else ever offered to refund to you any of that? A. They have not.

Q. Did anybody at any itme ever notify you that you and your daughter and her husband were not covered under this policy?

A. Not until December, 1948, December 29th, if I remember correctly.

Q. I am handing you Exhibit No. 8.

A. Yes.

(Testimony of Amandus A. von Borstel.)

Q. You now have in your hands the document marked Exhibit No. 8. Can you identify this exhibit.

A. Yes. I believe I received it from the company on December—December 29th, I think it was. That might have been the date I got my mail.

Q. You said “I received it.” Would you tell us, so the record [34] will show, what it was you received? What is it you hold in your hand?

A. A letter. It is a letter from the Farmers Insurance Exchange.

Q. To whom?

A. To A. von Borstel, Kent, Oregon.

Q. And that is you? A. That is me.

Q. What is the date of this letter?

A. And they denied any protection being covered under Policy No. 2098402.

Q. Would you please tell us the date of the exhibit? A. December 27, 1948.

Q. As your memory serves you now, you received that letter in due course of mail, is that correct? A. Yes.

Q. You remember receiving such a letter, do you?

A. I received the letter from the company, registered mail.

Q. Had you been served with any papers in an action arising out of this accident, Mr. von Borstel?

A. On December 24th I was served with summons.

Q. You were served on December 24th with summons and complaint in the case of Holm—

(Testimony of Amandus A. von Borstel.)

A. In the case of Holm vs. Sondenaa, Elmer Sondenaa.

Q. And yourself, too; you were named as one of the defendants? A. And myself. [35]

Q. After receiving that what did you do with the complaint and summons?

A. I took it to my attorney, Mr. Brown, in The Dalles.

Q. Mr. Brown of the firm of Brown & Van Vactor, Attorneys in The Dalles?

A. That is correct.

Q. You took that summons and complaint to him? A. Yes.

Mr. Pendergast: If the Court please, at this time I would like to offer in evidence the exhibit marked Plaintiff's Exhibit No. 8 for Identification.

Mr. Gearin: We have no objection.

(Letter dated December 27, 1948, Farmers Insurance Exchange, to Mr. A. von Borstel, Kent, Oregon, heretofore marked for identification, was thereupon received in evidence as Plaintiff's Exhibit No. 8.)

Mr. Pendergast: May I inquire if it is proper at this time to read this exhibit to the jury?

The Court: Don't do that now. Let's get as much of the case in today as we can and you may read the exhibit later.

Mr. Pendergast: Very well, your Honor. I ask that the witness be handed Exhibit No. 7.

(Testimony of Amandus A. von Borstel.)

The Court: Where is this clause you rely on in this policy, Mr. Gearin? [36]

Mr. Gearin: Conditions 17 and 18 on the second page of the policy. I only have a photostatic copy here. They are Conditions No. 17 and No. 18.

The Court: What are the titles?

Mr. Gearin: "Changes" and "Assignments."

The Court: All right. I have it.

Q. (By Mr. Prendergast): You now hold in your hand Exhibit marked No. 7; is that correct?

A. That is correct.

Q. Can you identify this exhibit? First, it is a letter, is it not, Mr. von Borstel?

A. It is a letter from the Farmers Insurance Exchange to Brown & Van Vactor, Attorneys-at-Law, The Dalles, Oregon.

Q. Brown & Van Vactor were your attorneys?

A. Yes, they were.

Q. What is the date of the letter?

A. December 30, 1948.

Q. Have you seen this letter before?

A. Yes, I believe I have a copy of this letter.

Q. That letter, in substance, informs your attorney that the insurance company disclaims any responsibility? A. That is correct.

Q. Any responsibility to defend you under the policy? A. To defend me under the policy.

Mr. Prendergast: May the plaintiff at this time move the [37] receipt in evidence of Exhibit No. 7?

Mr. Gearin: I have no objection.

(Testimony of Amandus A. von Borstel.)

(Letter dated December 30, 1948, Farmers Insurance Exchange, to Brown & Van Vactor, Attorneys-at-Law, The Dalles, Oregon, heretofore marked for identification, was thereupon received in evidence as Plaintiff's Exhibit No. 7.)

Q. (By Mr. Prendergast): As a result of the letter you received from the insurance company, disclaiming any responsibility or, rather, as a result of the letter that the Farmers Insurance Exchange sent to your attorneys, refusing to defend you in the case then pending against you, what did you do in reference to defending yourself, Mr. von Borstel?

A. May I have that again, now?

Q. Did you hire any attorneys to defend you?

A. Yes.

Q. Whom did you hire?

A. I hired King, Wood, Miller and Anderson.

Q. That is a firm of attorneys in Portland?

A. Yes.

Q. And they represented you in the trial of the action brought by Mrs. Holm against you and the Sondenaas?

A. That is correct.

Q. You paid your attorneys yourself?

Mr. Gearin: Objected to, your Honor, on the ground and for [38] the reason that it would be entirely immaterial to the present proceeding.

The Court: Objection sustained.

Q. (By Mr. Prendergast): Did the Farmers Insurance Exchange do anything other than writing you a letter refusing to defend you or to represent

(Testimony of Amandus A. von Borstel.)

you, or disclaiming any liability under this policy?

A. They did nothing further, no.

Q. The accident, I believe you testified, occurred October 3, 1948, Mr. von Borstel. Did anybody from the Farmers Insurance Exchange or representing the Farmers Insurance Exchange, the defendant in this case here, interview you or discuss with you this claim or the accident after the accident?

A. There was a representative from the company come out to see me, sometime in November.

Q. Can you give us the approximate date?

A. No, I couldn't.

Q. Was it early in November or late?

A. It was about near the middle of November.

Q. Near the middle of November?

A. Yes.

Q. Do you know who this gentleman was?

A. I don't recall his name.

Q. He represented himself as representing the Farmers Insurance Exchange? [39] A. Yes.

Q. Did he take a statement from you?

A. He did.

Q. The statement was in relation to this accident? A. It was in relation to the accident.

Q. At that time did you notify this party that you had transferred the car to your daughter?

A. As I recall, that was one reason he come out to see me, and that was to clarify the title of the car, because title was in my daughter's name and the policy was still in my name.

(Testimony of Amandus A. von Borstel.)

Q. He wrote out a statement and you signed the same? A. That is correct.

Q. And you gave it to him at that time?

A. Yes.

Mr. Prendergast: I believe that is all. You may inquire.

Cross-Examination

By Mr. Gearin:

Q. Mr. von Borstel, you saw Mr. Lawrence at The Dalles around the 1st of July?

A. That is correct.

Q. Sometime towards the end of July your daughter came up from Toledo and got the car?

A. Sometime in July, yes.

Q. At the time you saw Agent Lawrence did you tell him when your [40] daughter was going to get the car or when you were going to transfer title? A. Just in the near future.

Q. After the time you transferred title and before the accident did you notify anyone connected with Farmers of the fact that you had transferred your car? A. Only Mr. Lawrence.

Q. And that was in the first part of July?

A. Yes.

Q. That is the only time you saw Mr. Lawrence that year or until after the accident?

A. That is the only time.

Q. Did you notify the Exchange of the fact that there had been an accident?

(Testimony of Amandus A. von Borstel.)

A. I did not.

Q. Did you communicate with any other representative of the Farmers Insurance Exchange from the time you first saw Mr. Lawrence until after the accident? A. I did not.

Q. Did you write a letter or direct any other communication, oral or written, to the Exchange from the time you first saw Mr. Lawrence until after the accident? A. I did not.

Q. Did you advise anyone, either orally or by writing, connected with the Exchange of the fact of this transfer or the fact of the [41] accident before you paid this premium on November 5, 1948?

A. If I understand you correctly, I did.

Q. Whom did you notify?

A. Well, I didn't notify—if I understand the question correctly, it was whether I had discussed it with any of the agents or representatives of the company.

Q. Yes.

A. And I did, with a man that come out in November, the first part of November, to clarify the title of the car.

Q. Well, now, when the man came out to clarify the title of the car, as you say, Mr. von Borstel, was that before or after you had paid the premium?

A. That would be shortly after.

Q. So, at the time you paid the premium you had not advised the Exchange, either orally or by

(Testimony of Amandus A. von Borstel.)

writing, of the fact of the transfer or of the accident? A. No, I hadn't.

Q. Was there any discussion when you saw Agent Lawrence about the first of July about your taking the car over to Toledo and giving it to your daughter there? A. Yes.

Q. Was there any discussion that you had with Agent Lawrence at that time with regard to the question of coverage while your daughter was driving the car and before title was transferred?

A. Yes. [42]

Q. Didn't Mr. Lawrence tell you at that time that the policy would cover your daughter while she was driving the car, before title was transferred?

A. And after the title was transferred.

Q. Didn't Mr. Lawrence tell you, Mr. von Borstel, that your daughter would have to sign a new application? A. Not that I recall.

Q. Shortly after you were served with summons and complaint, which you turned over to Attorney Brown, you went to see Mr. Lawrence again, did you not, with Mr. Brown, your attorney?

A. Will you repeat that question?

Q. After you were served with summons and complaint in this case, you and your attorney, Mr. Brown, went see Agent Lawrence, did you not?

A. Not shortly after, no.

Q. When did you go down to see him, the agent? Can you remember?

A. It was sometime this year.

Q. At that time Mr. Lawrence denied making

(Testimony of Amandus A. von Borstel.)

the statement that the policy would be good as long as the premiums were paid? A. He did.

Mr. Gearin: I wonder if I could have the Bailiff hand the witness Exhibit No. 27, which is Mr. von Borstel's deposition.

(Exhibit No. 27 for Identification was handed to the witness.)

Q. (By Mr. Gearin): Mr. von Borstel, I am calling your attention [43] to Page 7 of that document. Do you recall the occasion when your deposition was taken?

A. I didn't get the question.

Q. You have before you your deposition. You have read and have previously signed your deposition, have you? A. I have.

Q. I will call your attention to the questions on the top of Page 7 and I will ask you if you made those answers to the questions contained therein at the time of your deposition on June 2, 1950, at The Dalles?

“Q. So that I can get your testimony straight and there will be no question about your testimony, Mr. Borstel: I understand that you advised Mr. Lawrence that you were going to give the car to your daughter? A. Yes.

“Q. And you wanted to know about transferring the insurance? A. Yes.

“Q. And he told you that your daughter would have to sign a new application?

“A. Yes.”

(Testimony of Amandus A. von Borstel.)

Did you so testify?

A. Yes, the deposition must be correct.

Q. There was no doubt in your mind, was there, Mr. von Borstel, but what your daughter did have to sign for the policy, was there? [44]

A. Well, I wouldn't know. I don't know the proper procedure to transfer an insurance policy from one name to the other.

Q. There was no doubt in your mind at that time but that, as a result of your conference with Mr. Lawrence, your daughter would have to sign for the policy, was there? A. Yes.

Q. Mr. von Borstel, when you transferred the policy from your first car to your second car, you made a written request to the Exchange, did you not?

A. I can't recall, but I do believe that I talked to their representative, to the Company's representative, in Wasco, George B. Moon.

Q. Do you remember making a writing in connection with it? A. I don't recall it.

Mr. Gearin: I wonder if I could have the Bailiff hand to the witness Exhibit No. 19.

(Exhibit No. 19 handed to the witness.)

Q. (By Mr. Gearin): Does your signature appear on the bottom of that colored piece of paper?

A. Yes, that is correct.

Q. Is your memory now refreshed as to whether or not you made a written request to the company for a change of the policy?

(Testimony of Amandus A. von Borstel.)

A. I still wouldn't know if that would be to the company or to Moon.

Q. Do you remember whether you gave it to Mr. Moon or not? [45] A. I don't recall.

Mr. Gearin: May Exhibit No. 4 be handed to the witness?

(Exhibit No. 4 handed to the witness.)

Q. (By Mr. Gearin): Mr. von Borstel, in reference to the policy, which is Exhibit No. 4 and which you have identified, I call your attention to the rider that is connected to the policy with regard to the transfer of the automobile from the old Plymouth to the new Plymouth. Do you have that in front of you now?

A. I believe, if I have it correct here——

Q. You have the policy in front of you, and the rider? A. Yes.

Q. Mr. von Borstel, do you recall receiving in the mail, from Portland, the policy rider covering the change of the automobile?

A. You mean on this '40?

Q. Yes, the 1940 Plymouth.

A. No, I don't recall.

Q. You don't recall whether you got that? You don't recall whether it came in the mail?

A. No, I wouldn't recall, because that is too long a time.

Q. At the time of the transfer of title your daughter was living with her husband at Toledo?

(Testimony of Amandus A. von Borstel.)

A. She did.

Q. She was not living with you and Mrs. von Borstel? A. No.

Q. Did you live in the town of Kent or out in the country a ways? [46]

A. I lived seven miles south of Kent.

Mr. Gearin: I wonder if we could have introduced in evidence Exhibit No. 19 which the witness has identified?

Mr. Prendergast: May I see what No. 19 is?

Mr. Gearin: No. 19 is Mr. von Borstel's written request to change the automobile over to a 1940 Plymouth.

Mr. Prendergast: I do not see the materiality of it at all. I object to it as incompetent, irrelevant and immaterial to any issue in this case.

The Court: Admitted.

(Memorandum signed by Amandus A. von Borstel, requesting change of Policy No. 2098402 to Plymouth sedan, with copy of acknowledgment of Farmers Automobile Inter Insurance Exchange attached, heretofore marked for identification, was thereupon received in evidence as Defendant's Exhibit No. 19.)

Mr. Gearin: I wonder if we can have admitted into evidence Exhibits 13 and 14 that have been identified, and which consist of Mr. von Borstel's statement and his written report of the accident?

The Court: Is there any objection?

Mr. Prendergast: Do I understand that you are

(Testimony of Amandus A. von Borstel.)

offering the deposition that you have read from?

Mr. Gearin: No. What I am offering now is Mr. von Borstel's [47] statement taken by the adjuster of the Exchange, I think on the 13th of November, 1948, which is Exhibit No. 13, and also the form "Report of Accident" signed by him.

Mr. Prendergast: I have no objection to those.
The Court: Admitted.

(Handwritten statement, dated Kent, Oregon, November 13, 1948, signed by A. von Borstel, heretofore marked for identification, was thereupon received in evidence as Defendant's Exhibit No. 13; and

("Report of Accident" signed by A. von Borstel, heretofore marked for identification, was thereupon received in evidence as Defendant's Exhibit No. 14.)

Mr. Gearin: I have no further questions, your Honor.

Redirect Examination

By Mr. Prendergast:

Q. You testified that when you talked to Mr. Lawrence he informed you that as long as the premiums were paid it was covered for yourself and daughter and family, on this car? A. Yes.

Q. Did you rely upon that statement?

A. I did.

Q. You informed your daughter—— [48]

A. I did.

Q. ——of the same conversation?

(Testimony of Amandus A. von Borstel.)

A. Yes, I did.

Q. You took out no other insurance on this car?

A. No.

Q. And your purpose of going to see Mr. Lawrence was to protect this car insurance?

A. To see that the car was covered with insurance.

Mr. Prendergast: That is all.

The Court: Step down.

(Witness excused.)

The Court: Take the jury upstairs.

Mr. Gearin: We have no objection to the issuance of a subpoena duces tecum.

The Court: All right. I want to talk to your attorneys.

(The jury was thereupon excused from the courtroom.)

The Court: I want to talk to you about this clause. I don't see anything special in this clause that is any different from any other insurance policy.

Mr. Gearin: Your Honor, Section 18 of the "Conditions" reads:

"No assignment of interest under this policy shall bind the Exchange until its consent is endorsed hereon——"

The Court: That is in all insurance policies.

Mr. Gearin: This is the policy of insurance. [49]

The Court: I know.

Mr. Gearin: This is not the regular policy.

The Court: I know, reciprocal.

Mr. Gearin: Yes.

The Court: But you are talking about that clause. That is no different from any other clause.

Mr. Gearin: I think that is the standard clause, your Honor.

The Court: Yes, so it will be treated just as it would be in any other insurance policy. You mean reciprocal insurance should be treated differently, but I am not prepared to agree with that. I treat those just like any other insurance policy.

Mr. Gearin: The important difference, your Honor, is this: Condition 18 deals with financial responsibility and responsibility to the members of the Exchange. It is quite different, separate and apart from the usual policies of casualty insurance. That is our position.

The Court: I just disagree; that is all. I will tell you, I have never tried an insurance case here where there was any word such as "mutual" or "reciprocal" or anything of the sort but what the same argument was made. I will treat this as any other insurance contract. Your point seems to be that until someone changes title down in the Secretary of State's office——

Mr. Gearin: Before she changed title, anyone driving it with the permission of the insured would be an additional insured [50] under the encompassing clause.

The Court: In other words, he didn't need to go to see the man at The Dalles?

Mr. Gearin: That is right.

The Court: If she had not gone to the Secretary of State's office, this thing would have gone on forever?

Mr. Gearin: No, your Honor. Where there are two separate households, more than 200 miles apart, and there are people besides the family driving the car, I don't think that would hold true.

The Court: There was nobody outside the family driving the car?

Mr. Gearin: Two different and separate households.

The Court: Where is that in here?

Mr. Gearin: That is in the case, so far.

The Court: Is that in the policy?

Mr. Gearin: No, that is not in the policy, your Honor, but as a practical matter you can't have a policy for one insured and then have a surrender of control over the car and let it go several counties away to a different household to be used by other people. That is not within the contemplation of the risk when you consider the policy is given to one insured——

The Court: You heard what I said, didn't you?

Mr. Gearin: Yes.

The Court: I have heard counsel for insurance companies say [51] that when they insure your automobile the car is insured.

Mr. Gearin: Your Honor, if we look at the policy and the endorsements and the declaration of named insured, and the automobile, I think you will find that applies to that automobile while owned by the

insured. Item No. 7 of the Declarations reads:

“The named insured is the sole owner of the owner except as herein stated,”

and there is nothing stated. The declaration and representation made was that von Borstel was the sole owner of the automobile. That is the representation made in Item No. 7 of the Declarations.

The Court: Granted it was so at the time the insurance was written. Is there anything in the case so far that shows when the title change was made at the Secretary of State's office? You can take your time to find it. I don't need it right now.

(Recess.)

(The jurors then returned into court and took their places in the jury box.)

Mr. Prendergast: At this time, your Honor, I would like to move the Court to introduce Plaintiff's Exhibit No. 28. I understood from counsel during the recess, in the conversation we had during recess, that defendant is willing to stipulate——

The Court: Get a witness on the stand here while I am listening to this talk.

Mr. Prendergast: Exhibit No. 28 is a copy of the original SR21, the form required by the Secretary of State under the Oregon [52] law relating to financial responsibility, which was filed in the office of the Secretary of State on the 17th day of November, 1948, and signed by “A. Hochmeister” of the Farmers Insurance Exchange or Group, relating to the 1940 automobile; and Counsel has kindly consented that this copy of the record of the Secretary

of State's office may be admitted, which eliminates the necessity of subpoenaing someone from Salem. I offer it in evidence under the stipulation with Counsel that it is a copy of the original filed in the office of the Secretary of State.

The Court: Admitted.

(Copy of "Notice of Policy under Section 115-416 of Oregon Motor Vehicle Safety Responsibility Act of 1943" was thereupon received in evidence and marked Plaintiff's Exhibit No. 28.)

ELMER N. SONDENAA

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Prendergast:

Q. Will you state your full name?

A. Elmer Norton Sondenaa.

Q. Where do you live, Mr. Sondenaa?

A. At Toledo, Oregon. [53]

Q. Where did you reside in the year 1948?

A. At Toledo, Oregon.

Q. How long have you resided in Toledo, Oregon? A. For the past four years.

Q. Are you a married man? A. Yes.

Q. Your wife's name?

A. Mrs. Helen Sondenaa.

Q. Helen Sondenaa? A. Yes.

(Testimony of Elmer N. Sondenaa.)

Q. She is the daughter of Mr. A. von Borstel?

A. Yes.

Q. When were you married, Mr. Sondenaa?

A. In 1946.

Q. Can you give us your anniversary date?

A. June 6th.

Q. You have one child, I believe? A. Yes.

Q. When was this child born?

A. September 15th, 1948.

Q. What is your occupation?

A. Boilermaker.

Q. Do you recall the occasion of your father-in-law, Mr. A. von Borstel, giving to your wife a 1940 Plymouth automobile? A. Yes, I do. [54]

Q. Can you tell us when that was given to her?

A. In the latter part of July, 1948.

Q. Tell the jury how that came about?

A. My wife and I left Toledo on a Friday night and drove to Kent, Oregon, with my parents, and at the home of Mr. von Borstel he transferred the title to this 1940 Plymouth to my wife.

Q. On that occasion was anything said about the insurance on the 1940 Plymouth?

A. Yes, there was.

Q. What was said with relation to it?

A. My father-in-law told my wife and myself that he had been to see Mr. Lawrence in The Dalles about the transfer of the insurance policy for the coverage on the car, so it would also be transferred with the ownership, and Mr. Lawrence had told—

Mr. Gearin: That is objected to. We object to

(Testimony of Elmer N. Sondenaa.)

this witness testifying to what Mr. von Borstel said to Mr. Lawrence.

The Court: Overruled. Go on. Tell your story.

A. Mr. Lawrence had told Mr. von Borstel that we would be covered since it was already in the family.

Q. (By Mr. Prendergast): Did Mr. von Borstel then deliver to you and your wife the insurance policy at that time?

A. Yes, together with title to the car.

Q. In other words, he signed the title to the car and gave you the signed title and the insurance policy?

A. Yes. [55]

Mr. Prendergast: I wonder if you could hand the witness Exhibit No. 4?

The Court: You can stipulate on that, that that is the insurance policy?

Mr. Gearin: No question about that, your Honor.

Q. (By Mr. Prendergast): Did you or your wife continue to have this insurance policy in your possession after that date?

A. Yes, we did.

Q. Until when?

A. Until we gave it to our attorney, Mr. Nash.

Q. In other words, you have had it in your possession all the time except when it was in your attorney's possession?

A. Yes.

Q. Did you rely, and did your wife to your knowledge rely, upon the statements that your father-in-law made to you that the insurance policy covered you in the operation of this car?

Mr. Gearin: Object to that, your Honor, to him

(Testimony of Elmer N. Sondenaa.)

being allowed to testify as to what his wife relied on.

The Court: He may answer.

Mr. Prendergast: I will withdraw that.

The Court: All right.

Q. (By Mr. Prendergast): Did you rely upon this statement Mr. von Borstel made to you?

A. Yes, I did.

Q. Did you seek or take out any other insurance protection on [56] the car? A. No.

Q. Did you operate that car with the idea that you were covered in the operation of the car?

A. Yes, as we were fully aware of the financial responsibility laws in this state.

Q. What was your wife's condition, her physical condition, at the time the car was given to you or to her? A. She was pregnant.

Q. Did she operate the car herself, then, after the gift of the car to her, up until the time of the accident?

A. I drove the car with her okeh.

Q. In other words, you were acting as the operator of the car during that period of time?

A. Yes.

Q. Was it difficult for her to get around?

A. Yes, it was.

Q. Was anything done or said about signing this policy? A. I don't remember anything.

Q. Was anything done by you or your wife, to your knowledge, about getting this policy endorsed in any way or changed in any way?

A. Yes. I looked in the phone book in Toledo

(Testimony of Elmer N. Sondenaa.)

for the agency of the Farmers Inter-Auto Insurance, and found none.

Q. You found none listed in the Toledo telephone directory? [57] A. That is right.

Q. How much did you operate this automobile between the date of the gift and the time of the accident? Did you take any extended trips?

A. No, we drove just to and from work.

Q. How far was that?

A. Four to five miles a day.

Q. You drove the car back from Kent to Toledo?

A. Yes.

Q. Did you make another trip over to Kent in this car? A. Yes, we did, in October.

Q. That was after the baby was born?

A. Yes.

Q. You visited the grandparents, Mr. and Mrs. von Borstel? A. Yes.

Q. Then you started home, back to Toledo?

A. Yes.

Q. You were operating the car? A. Yes.

Q. And you had this accident in which Mrs. Holm was injured? A. Yes.

Q. Immediately after the accident, what, if anything, did you do in regard to notifying the Farmers Insurance Exchange that you had had an accident?

A. The accident happened on Sunday and Tuesday following I wrote [58] a registered special delivery letter to George Moon in Wasco.

Q. Where did you get that name?

(Testimony of Elmer N. Sondenaa.)

A. It was on the envelope that contained the insurance policy my father-in-law had given us.

Q. Did you inform Mr. Moon, then, that you had had an accident?

A. Yes, I gave him a full statement of the accident.

Mr. Prendergast: I apologize, your Honor. I do not have the number of the exhibit. It is attached to Mr. Sondenaa's deposition.

Mr. Gearin: It is No. 15.

Mr. Prendergast: Would you please hand the witness Exhibit No. 15.

(Exhibit No. 15 handed to the witness.)

Q. (By Mr. Prendergast): Mr. Sondenaa, you now hold in your hand Exhibit No. 15. Can you identify this exhibit? A. Yes, I can.

Q. What is it?

A. It is the report of the accident I had on October 3rd.

Q. The letter which you just testified you sent to Mr. Moon? A. Yes, it is.

Q. That exhibit is dated what date?

A. October 5, 1948.

Q. Addressed to George B. Moon at Wasco, Oregon? A. Yes.

Q. And signed by yourself? [59] A. Yes.

Q. Do you have the envelope attached thereto?

A. Yes, I have.

Q. It was sent by registered mail?

A. Yes, registered mail.

(Testimony of Elmer N. Sondenaar.)

Q. Does it bear a date on the envelope?

A. October 5, 1948.

Q. This letter refers to Policy No. 2098402.

That was the policy about which you have just testified that was given you by Mr. von Borstel?

A. Yes.

Q. It describes the automobile?

A. Yes.

Q. And you informed Mr. Moon of the details of the accident? A. Yes.

Q. You advised Mr. Moon that you had been unable to get in touch with the company's agent in Toledo or Newport? A. Yes.

Q. After mailing that letter, when did you next see that letter, Mr. Sondenaar?

A. When my deposition was taken.

Q. When it was produced there, who had the letter? A. Mr. Gearin.

Q. Mr. Gearin had it? A. Yes. [60]

Q. After mailing this letter to Mr. Moon did you hear anything further with relation to this accident? A. Yes, about a month later.

Q. That would be approximately November 5th, is that right? A. Or November 10th.

Q. November 10th? A. Yes.

Q. What occurred on November 10th, Mr. Sondenaar?

A. Mr. Patterson from the Claims Office in Eugene came to see me and took a statement of the accident.

Q. At that time, November 10, 1948, did you

(Testimony of Elmer N. Sondenaar.)

notify Mr. Patterson or the company, through Mr. Patterson, as to how this car was acquired by your wife?

A. Yes, we did.

Q. Did you give him the full details as to the title?

A. Yes. He looked at the title.

Q. He looked at the title at that time?

A. Yes.

Q. Did you give Mr. Patterson any correspondence or any documents relating to any claim made against you by reason of this accident?

A. Yes. I gave him letters from Mr. Weinstein and Stephen Parker.

Q. Those are the attorneys who made the claim against you as a result of this accident, is that correct?

A. Yes. [61]

Q. You turned those over to Mr. Patterson, representing the Farmers Insurance Company, or the Farmers Insurance Exchange?

A. Yes.

Q. That was on the 10th of November?

A. Yes.

Q. Did Mr. Patterson have any further conversation with you in relation to defending you or protecting you on those claims?

Mr. Gearin: Objected to, your Honor, on the ground and for the reason that any statement made by Mr. Patterson after the accident could not possibly form a basis for estoppel, with regard to the transfer of the policy, and upon the further ground that it has not been shown that this man, Patterson, an adjuster, had any authority to make any admission which might be binding on the Exchange.

(Testimony of Elmer N. Sondenaa.)

The Court: Answer.

Q. (By Mr. Prendergast): You may answer the question.

Mr. Gearin: May I make this objection general as to all statements and all testimony in regard to the statements of Patterson?

The Court: It is so understood.

A. Will you read the question, please?

(Question read).

A. Yes, he did. I objected to giving Mr. Patterson the correspondence I had received from those attorneys, and he said, inasmuch as the Farmers Insurance Exchange was representing me [62] in the accident, it was my duty, as the insured, to turn over all correspondence to him.

Q. (By Mr. Prendergast): And, based on that, did you turn the correspondence all over to him?

A. Yes, sir, I did.

Q. What next did you hear, Mr. Sondenaa, in regard to this accident? Did you have any further conference with anybody?

A. I received a summons and complaint on Christmas Eve.

Q. That was in the case of Mrs. Holm against you and your wife and your father-in-law?

A. Yes.

Q. And the case was in the Circuit Court of Multnomah County, State of Oregon?

A. Yes, it was.

Q. What did you do with those papers?

(Testimony of Elmer N. Sondenaa.)

A. I sent those to the Insurance Exchange office in Eugene, as instructed by Mr. Patterson.

Mr. Prendergast: At this time, your Honor, may we offer Exhibit 15?

Mr. Gearin: No objection.

(Report of Accident, dated October 5, 1948, signed by Elmer N. Sondenaa, Toledo, Oregon, addressed to Farmers Automobile Insurance, George B. Moon, Wasco, Oregon, heretofore marked for identification, was thereupon [63] received in evidence as Plaintiff's Exhibit No. 15.)

Mr. Prendergast: May I have Exhibit No. 9 handed to the witness.

(Exhibit No. 9 handed to the witness.)

Q. (By Mr. Prendergast): You now have in your hand an exhibit marked No. 9. Is that correct?

A. Yes.

Q. Can you identify this document?

A. Yes, I can.

Q. It is a letter, is it not?

A. Yes. It is a letter from the Farmers Insurance Exchange.

Q. To whom? A. It is addressed to me.

Q. Did you receive the same?

A. I received the same.

Q. The date of the letter is what?

A. December 27, 1948.

Q. And it is in relation to this accident?

A. Yes.

Q. In substance, it advises you the Insurance

(Testimony of Elmer N. Sondenaa.)

Exchange will not defend you in the lawsuit that was filed against you? A. That is right.

Q. Stating that they had no responsibility under this policy? A. That is right. [64]

Mr. Prendergast: I offer Exhibit No. 9 in evidence.

Mr. Gearin: We have no objection.

The Court: Admitted.

(Letter dated December 28, 1948, Farmers Insurance Exchange, to Mr. Elmer Sondenaa, Toledo, Oregon, hereto marked for identification, was thereupon received in evidence as Plaintiff's Exhibit No. 9.)

Q. (By Mr. Prendergast): As a result of the Insurance Exchange's letter and refusal to defend you, did they return to you the complaint and summons? A. Yes, they did.

Q. Then, based on their refusal, what did you do, Mr. Sondenaa?

A. I retained another counsel.

Q. That is, your own attorney? A. Yes.

Q. You retained your own attorney to defend the case. A. Yes.

Q. At your own expense?

Mr. Gearin: Objection, your Honor. It is a question of defense, and this matter of expense, as far as he is concerned, does not bear any relationship to any of the issues.

The Court: Answer Yes or No. At your own expense? A. Yes.

(Testimony of Elmer N. Sondenaa.)

Q. (By Mr. Prendergast): As a result of this lawsuit, this action [65] filed in the Circuit Court of the State of Oregon for Multnomah County, by Louise Holm, a judgment was rendered against you, was it not, Mr. Sondenaa? A. Yes, it was.

Q. You have been handed Exhibit No. 3. You have Exhibit No. 3 in your hand, Mr. Sondenaa. That is the judgment, is it not, a certified copy of the judgment in that case? A. Yes, it is.

Q. Do you recognize that as the judgment that was entered against you?

A. I don't recall having seen this document.

The Court: They will stipulate that.

Mr. Prendergast: Will you stipulate that is a certified copy?

Mr. Gearin: No question at all about the judgment being entered, your Honor.

Mr. Prendergast: We offer Exhibit No. 3 in evidence.

Mr. Gearin: No objection.

The Court: Admitted.

(Copy of Judgment in the Circuit Court of the State of Oregon for the County of Multnomah in cause entitled "Louise Holm, Plaintiff, vs. Elmer N. Sondenaa and Helen L. Sondenaa, husband and wife, and A. Von Borstel, Defendants," No. 185-807, heretofore marked for identification, [66] was thereupon received in evidence as Plaintiff's Exhibit No. 3.)

Q. (By Mr. Prendergast): After this judg-

(Testimony of Elmer N. Sondenaa.)

ment was entered against you, Mr. Sondenaa, did you pay the sum mentioned by the judgment?

A. No, I didn't.

Q. Have you paid any part of the judgment?

A. No.

Q. Are you able to pay any part of the judgment? A. No, I am not.

Q. Is your wife able to assist you in paying any part of the judgment? A. No, she is not.

Q. What property do you have, Mr. Sondenaa?

A. Part of an automobile.

Q. A part interest in an automobile?

A. Yes.

Q. Do you own your own home? A. No.

Q. Do you rent? A. Yes, I do.

Q. Do you have any bank account?

A. Yes, but it is negligible.

Q. Do you have anything with which to satisfy this \$12,000 judgment and interest?

A. No, nothing. [67]

Q. I want to ask you this, Mr. Sondenaa: It may be reiteration, but I don't want to miss this particular point. After receiving the car and the insurance policy—I don't know whether I asked you if you relied upon the fact that that car was insured, in operating the same?

A. Yes, I did. If I had thought for a minute it had not been insured, I would have immediately gotten other insurance.

Mr. Prendergast: May I have the witness handed Exhibit 12?

(Testimony of Elmer N. Sondenaa.)

(Exhibit No. 12 was handed to the witness.)

Q. (By Mr. Prendergast): You now have Exhibit No. 12 in your hands. That is the statement made by you to the Insurance Exchange, is that correct? A. Yes.

Q. In whose handwriting is that, if you know?

A. The handwriting of Mr. Patterson.

Q. Whose signature is appended thereto?

A. It is my own signature.

Q. That is your signature? A. Yes.

Q. What is the date you gave that statement?

A. November 10, 1948.

Q. On that occasion Mr. Patterson wrote out the statement, you read it and signed the same and delivered it to him under date of November 10, 1948? Is that correct? A. Yes. [68]

Q. That is the document you now hold in your hand? A. Yes, it is.

Q. What exhibit number does it bear?

A. Exhibit No. 12.

Mr. Prendergast: The plaintiff offers this Exhibit No. 12 in evidence.

Mr. Gearin: No objection.

The Court: Admitted.

(Handwritten statement, dated November 10, 1948, Toledo, Oregon, signed by Elmer N. Sondenaa, heretofore marked for identification as Defendant's Exhibit No. 12, was thereupon received in evidence as Plaintiff's Exhibit No. 12.)

Mr. Prendergast: You may inquire.

(Testimony of Elmer N. Sondenaa.)

Cross-Examination

By Mr. Gearin:

Q. Mr. Sondenaa, you said you described the automobile when you wrote to Mr. Moon two days after the accident? A. Yes, I did.

Q. At that time your father-in-law had given you a 1937 Chevrolet sedan?

A. No, a 1940 Plymouth.

Q. Was the 1940 Plymouth described in the letter you wrote to [69] Mr. Moon?

Mr. Prendergast: I suggest Counsel give the witness the letter if he is going to inquire as to its contents. That is the best evidence.

Q. (By Mr. Gearin): Mr. Sondenaa, I am handing you Exhibit No. 15 and will ask you to read to the jury that portion of the letter which describes the 1940 Plymouth.

Mr. Prendergast: I suggest you read the whole exhibit. Your Honor, it is very short and I suggest he read the whole exhibit.

A. Shall I read the entire exhibit?

Mr. Gearin: If you will, please.

A. It is to "George B. Moon, Wasco, Oregon, Re Policy #2098402.

"Wish to report an accident involving the insured automobile and four (4) other cars and a Fordson tractor.

"Time—2:00 p.m.—10/3/48.

"Where: 250 ft. west of Welch Road on Loop Highway, which was about three miles east of Gresham.

(Testimony of Elmer N. Sondenaa.)

“Office: Multnomah County Sheriff’s Car No. 12.

“Had rear-end collision with car and driver listed below:

“Car—1937 Chevrolet sedan, 1948 License No. 178,918. Driver: Carl Sigurd Holm, 3205 N.E. 78th Avenue, Portland, Oregon. Driver’s License No. 405,005, expires 1/10/50.” [70]

The rest of this is a report of the details of the accident.

Q. As to how it happened? A. Yes.

Q. Mr. Sondenaa, I believe you testified you and your wife had incurred expense in the defense of this lawsuit brought against you by Mrs. Holm. Is that correct? A. Yes, it is.

Q. Have you paid any money in connection therewith? A. No.

Q. Mr. von Borstel this morning, or this afternoon, testified that he had paid the premiums, that you and your wife were not financially able to pay the premiums; is that correct?

Mr. Prendergast: I don’t think that is a correct statement, your Honor. I don’t think he testified he was financially unable to pay the premiums. He said they were having a hard time financially and it was easier for him to pay than the boy.

Q. (By Mr. Gearin): Were you, during this period of time, able to pay the premiums?

A. I had no extra money of my own.

Q. You say you looked in the phone book to see whether or not there was an agent in Toledo or Newport? A. Yes, I did.

(Testimony of Elmer N. Sondena.)

Q. Did you find an agent of the Farmers Insurance Exchange in Newport? [71]

A. Since that time I have.

Q. I am handing you Exhibit No. 10 and will ask you if you observed Page 47 of this telephone book, which is marked "December, 1947"?

Did you see that page when you looked in the phone book? A. Yes, I did.

Q. I am handing you Defendant's Exhibit No. 11, the phone book for December, 1948, and will ask you if you have seen Page 49 of that phone book?

A. Yes. That is their Corvallis address.

Q. I call your attention to the listing "Farmers Insurance, Gilkey Insurance Agency," which gives a Newport address and telephone number.

A. Yes, it is here.

Q. Did you call Judge Gilkey?

A. My wife found a number in Newport.

Q. Were you there at that time?

A. No, I wasn't.

Q. Why did your wife call the number in Newport? A. To report the accident we had.

Q. Wasn't your wife trying to call the insurance company to have the policy transferred?

A. No, we had had the accident and we wanted to report the accident.

Q. Did you ever have any conversation with Mr. Lawrence [72] A. No.

Q. The first contact you had with any representative of the Farmers Insurance Exchange was on

(Testimony of Elmer N. Sondenaa.)

November 10, 1948, when Mr. Patterson came to see you. Is that correct? A. Yes.

Mr. Gearin: At this time we offer Exhibits 10 and 11 in evidence.

Mr. Prendergast: I don't know what relevancy they have.

The Court: Are those Corvallis phone books?

Mr. Gearin: Corvallis, Toledo and Newport.

The Court: Is that the same phone book that they have at Toledo?

Mr. Gearin: That is correct. It has all Toledo numbers.

The Court: I know it, but is that phone book that a subscriber had in Toledo?

Mr. Gearin: That is correct, your Honor.

The Court: Is that the same phone book?

A. Yes, it is.

Mr. Gearin: How far is Toledo from Newport?

A. Nine miles.

The Court: Admitted.

(Telephone Directory, Corvallis and vicinity, December, 1947; and Telephone Directory Corvallis and vicinity, December, 1948, heretofore marked for identification, were [73] thereupon marked Defendant's Exhibits Nos. 10 and 11, respectively.)

Q. (By Mr. Gearin): Did not Mr. von Borstel tell you that your wife could have the policy transferred by seeing the local agent in the vicinity where you lived?

(Testimony of Elmer N. Sondenaa.)

A. No, not that I recall. He said that my wife would sometime have to sign for the policy.

Q. Isn't it a fact, as soon as you got back to Toledo, you tried to see an agent to have the policy transferred?

A. Will you clarify that question?

Q. Did you know, at the time Mr. von Borstel, your father-in-law, gave you the policy that your wife would have to sign a new application?

A. No.

Q. The statement you gave to Mr. Patterson on November 10, 1948, was correct, was it not?

A. Yes, it was.

Q. He wrote it out and you signed it?

A. Yes.

Q. You had an opportunity to read it and you did read it before you signed it?

A. Yes, I did.

Mr. Gearin: I wonder if the Bailiff could hand the witness Exhibit No. 25.

(Exhibit No. 25 was handed to the witness.)

Q. (By Mr. Gearin): Do you recall being at Toledo on May 31st, when I took your deposition, Mr. Sondenaa? A. Yes, I do.

Q. I call your attention to the questions and answers contained on Page 4 of your deposition. Starting with the third question. I will ask you if you gave these answers to these questions:

“Q. And after you and your wife came back to Toledo with the automobile, what, if anything, did either you or your wife do in connection with hav-

(Testimony of Elmer N. Sondenaa.)

ing the insurance transferred or signing any papers in connection with the insurance?

“A. Would you repeat that?

“(Whereupon the last question was read as above recorded.)

“A. Oh, we talked about it between ourselves and decided there was no rush to get other insurance or get this insurance transferred, because Mr. Lawrence said the car was still covered regardless of who was driving.

“Q. In other words, nothing was done by either *or your* wife during the period of time the premium was in force, is that your understanding?

“A. Oh, we made some effort to contact an agent.”

When you tried to contact an agent, was that to report the accident or to try to have the insurance transferred?

A. That was to report the accident. [75]

Q. Where were you taken after the accident? Did you go right to Toledo from the accident?

A. No. My wife went to the Providence Hospital for a few hours, and then we went to a hotel, and we did have some friends from Toledo come after us.

Q. Then you wrote Mr. Moon on Tuesday?

A. Yes.

Q. So you tried to find an agent, then, on Monday, is that correct? A. Yes, that is right.

Q. This testimony we have gone over, appearing on Page 4 of your deposition, did you make those

(Testimony of Elmer N. Sondena.)

answers to those questions no May 31st, this year, at Toledo? A. Yes, I did.

Q. And it is your understanding your wife was not to sign anything in connection with the transfer of this insurance? A. I don't understand that.

Q. What is your understanding as to whether or not your wife was or was not to sign any new application for this insurance?

A. My understanding was, as Mr. Lawrence had told my father-in-law, that sometime in the future she might have to sign for a new policy.

Q. That is what Mr. Von Borstel told you, is that correct? A. Yes.

Q. He told you that Mr. Lawrence said sometime your wife might [76] have to sign for the insurance, is that your best memory?

A. She might have to sign the policy itself.

Q. Yes.

A. That is my best remembrance.

Q. At any time that your wife had the policy did you read it? A. Yes.

Q. Before the accident? A. Yes, I did.

Q. At any time during that period of time that you had the car and the policy, and before the accident, did you ever try to see the agent at Toledo or anywhere with respect to having the policy transferred?

A. I don't know quite how to answer that.

Q. Well, your wife did not execute any document in connection with the insurance before the accident, did she? A. No.

(Testimony of Elmer N. Sondenaa.)

Q. Did either you or your wife, during the period of time the—before the accident, attempt to have that insurance transferred?

A. We looked for an agent, half-heartedly.

Mr. Gearin: That is all.

Redirect Examination

By Mr. Prendergast:

Q. What do you mean by “half-heartedly”? Did you believe the insurance was in effect without going to an agent, or did you [77] have to go to an agent before it became effective to cover?

A. We knew the insurance was in effect, because Mr. Lawrence had said so.

Q. Did you believe that there was any rush?

The Court: Step down. That is all. That has all been covered.

(Witness excused.)

Mr. Prendergast: I have one other witness by whom I would like to identify this exhibit.

The Court: Maybe he will stipulate with you on it.

Mr. Prendergast: I will do that with the next witness, your Honor.

Mr. Gearin: We have no objection to the introduction and reception in evidence of Exhibit No. 6

Mr. Prendergast: I offer the same.

The Court: Admitted.

(Carbon copy of letter dated December 31, 1948, Farmers Insurance Exchange by James N. Tomlin to Elmer N. Sondenaa and Helen L.

(Testimony of Elmer N. Sondenaa.)

Sondenaa, Toledo, Oregon, heretofore marked for identification, was thereupon received in evidence as Plaintiff's Exhibit No. 6.)

The Court: Is this your last witness?

Mr. Prendergast: I have one other witness. [78]

The Court: Who?

Mr. Prendergast: An expert.

The Court: An expert on what?

HELEN L. SONDENAA

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Prendergast:

Q. Your name is Helen L. Sondenaa?

A. Yes.

Q. You are the wife of Elmer N. Sondenaa who just testified? A. Yes.

Q. You are daughter of Mr. A. von Borstel?

A. That is right.

Q. What is your age, Mrs. Sondenaa?

A. Twenty-seven.

Q. You lived at home in Kent, Oregon, until what date? A. September 5, 1944, I believe.

Q. Then where did you go?

A. To Corvallis.

Q. To Oregon State College? A. Yes.

Q. Then you and Mr. Sondenaa were married when? A. June 6, 1944.

(Testimony of Helen L. Sondenaa.)

Q. Where were you married?

A. Pardon me?

Q. Where were you married?

A. In The Dalles.

Q. After your marriage did you move to Toledo?

A. Well, we moved to Portland for eleven months and then went to Toledo.

Q. You have lived in Toledo since?

A. Yes.

Q. Your occupation is that of housewife and mother—of course, they are both the same.

A. Yes, they are.

Q. Mrs. Sondenaa, your father gave you a 1940 Plymouth? A. Yes.

Q. Is that right? A. Yes.

Q. Can you tell us approximately when that was? A. About the 26th of July in 1948.

Q. Before you received this gift from your father and mother, did they talk to you about giving that car to you? A. Yes.

Q. Did you go up to Kent for the purpose of getting the car? A. That is right. [80]

Q. When you went up there with your husband you knew you were going to get the car?

A. Yes.

Q. Was that before you had the baby?

A. Yes.

Q. Approximately how long before the baby came? A. About two or three months.

Q. What was your condition at that time?

A. Wasn't able to get around very well.

(Testimony of Helen L. Sondenaar.)

Q. How long did you visit at your home when you went up to get this car?

A. We went up on a Saturday and came back on Sunday.

Q. Did your father at that time sign the title to the Plymouth for the purpose of the transfer?

A. Yes.

Q. And he gave you the signed title?

A. That is right.

Q. In other words, the title was issued by the Secretary of State and he simply endorsed it and gave it to you?

A. Yes.

Q. At some time later, I believe the 29th of July, you sent that in for a new title in your name?

A. Yes.

Q. You sent that in to the Secretary of State?

A. Yes. [81]

Q. At the same time your father gave you the title to this car and gave you possession of the Plymouth did he give you an insurance policy?

A. He did.

Q. The insurance policy that is involved in this litigation?

A. That is right.

Q. At that time did your father tell you anything with regard to this insurance policy?

A. He told me he had seen Mr. Lawrence in The Dalles and Mr. Lawrence said——

The Court: Wait a minute.

Mr. Gearin: I will object to what Mr. Lawrence said, your Honor, and object to this line of testimony. What Mr. von Borstel told this witness that Mr. Lawrence had said is hearsay.

(Testimony of Helen L. Sondenaar.)

The Court: Objection overruled. What did he tell you? Go ahead.

A. My father told me that Mr. Lawrence said I should have my signature affixed to the policy in the area in which I was living, but there was no rush for it because I was a member of the family and the policy was good.

Q. (By Mr. Prendergast): Did you rely upon that statement that your father made?

A. Yes, I did.

Q. Believing that Mr. Lawrence said that?

A. That is right. [82]

Q. Did you get any other insurance on the car?

A. No, we didn't; because of what Mr. Lawrence said we felt the policy was good.

Q. Mrs. Sondenaar, did your husband drive the car back to Toledo on Sunday?

A. Yes, he did.

Q. Were you able to drive after that, until the time the baby came? A. I didn't drive.

Q. Your husband drove the car for the family, is that right? A. That is right.

Q. After the baby came, you went up and showed the baby to its grandparents? A. Yes.

Q. And that was the time you had the accident?

A. Yes.

Q. You were in the car at the time?

A. Yes, I was.

Q. Were you and the baby hurt?

Mr. Gearin: That is objected to.

(Testimony of Helen L. Sondenaa.)

The Court: It doesn't make any difference.

Mr. Prendergast: I will withdraw the question.

Q. Anyway, the accident happened on Sunday?

A. Yes.

Q. After the accident you were taken to the hospital? [83]

A. Yes.

Q. When, if you know, did your husband make a report of this accident?

A. It happened that the accident was on a Sunday, and on Tuesday he mailed the report to the insurance company.

Q. Before mailing the report to Mr. Moon, did you or he attempt to locate anybody down there at the Coast representing the insurance company?

A. Yes, we did.

Q. With any success? A. No.

Q. What did you do in regard to that?

A. I called up a man downtown that I thought was the agent for the Farmers Insurance.

Q. What made you think he was an agent for the Farmers Insurance?

A. I had seen a sign in his window, but he advised me that was another insurance company.

Q. Another Farmers Insurance? A. Yes.

Q. That man was at a floral shop?

A. Yes, he was.

Q. Did he give you any information about getting in touch with the right insurance company?

A. He gave me a party to call in Newport, and the operator in Newport told me the phone had been taken from that office. [84]

Q. Then your husband wrote to Mr. Moon and reported the accident? A. Yes, he did.

(Testimony of Helen L. Sondenaa.)

Q. After that date, which would be approximately the 5th of October, 1948, did you confer with anybody from the Farmers Insurance Exchange with regard to this accident?

A. After that date?

Q. Yes.

A. Mr. Patterson came to call on us.

Q. That would be approximately when?

A. The 10th of November, I believe.

Q. At that time did you talk to Mr. Patterson about the accident?

A. Yes, we did.

Q. Did you notify him as to where title to the car was?

A. Yes.

Q. In whose name title was carried? In whose name title was registered?

A. Yes.

Q. Did you tell him how you got the car?

A. Yes.

Q. Did you show him the insurance policy?

A. Yes, he looked at the policy.

Q. Did you deliver to him any document or letters or demands made upon you or Mr. Sondenaa?

A. He took the correspondence from us and said his company [85] represented us and we would have these back.

Q. You relied upon his statement and delivered to him all these things?

A. Yes.

Q. Except the policy which you retained?

A. We kept that.

Q. Your husband gave a statement to Mr. Pat-

(Testimony of Helen L. Sondenaa.)

terson on November 10th. Did he come back later on the 18th and take a statement from you?

A. Yes, he did. He had forgotten to take any statement and he returned.

Q. He was there twice? A. Yes.

Q. Both times he talked to you and Mr. Sondenaa?

A. Just the first time, but Mr. Sondenaa had been at work the second time Mr. Patterson came.

Q. Did you give Mr. Patterson all the information he requested? A. Yes.

Q. And all the documents he requested?

A. Yes.

Q. And you told him all the truth and the whole story? A. That is right.

Q. He told you the Farmers Insurance Exchange was representing you in the accident?

A. He did. [86]

Q. Did you report that information to your father, tell him as you went along about the developments?

A. Well, we kept in contact with one another.

Q. Did he advise you he had paid the premium for another six months?

Mr. Gearin: Objected to as immaterial.

The Court: She may answer.

Q. (By Mr. Prendergast): Did your father advise you he had paid the premium for another six months? A. Yes, he did.

Q. You were made a party defendant in this

(Testimony of Helen L. Sondenaa.)

lawsuit brought by Mrs. Holm against you and your husband and your father? A. Yes.

Q. The insurance company papers were sent by you to the insurance company, the same as your husband's? A. Yes.

Q. They refused them and sent them back?

A. Yes; that is right.

Q. And advised you they would not represent you or defend you in this action?

A. That is right.

Q. You thereupon hired your own attorney, is that right? A. Yes.

Q. He defended you successfully, as far as that particular litigation was concerned; no judgment was rendered against you [87] personally, but judgment was rendered against your husband?

A. That is right.

Q. Did your husband have anything with which to pay a \$12,000 judgment?

The Court: That is cumulative. It won't be denied.

Mr. Prendergast: That is all.

Cross-Examination

By Mr. Gearin:

Q. The statement you gave to Mr. Patterson on November 18th was the truth, was it not?

A. Yes.

Q. When you got this car, your father told you you should sign a new application for the policy?

A. He did not.

Q. He said you would have to sign for it?

A. He said I would have to sign for it. As I understood, I affixed my signature to the policy.

(Testimony of Helen L. Sondenaa.)

Q. What did you do with regard to doing that between the time you got the car in the latter part of July and the date of the accident, which occurred in October?

A. I tried to call and find the Farmers representative, but I wasn't able to.

Q. Did you call Judge Gilkey in Newport?

A. No. [88

Q. Did you call the agent in Corvallis?

A. No.

Q. Were you able to drive the car when you got back from the trip to Kent in July?

A. I didn't drive at all.

Q. Did you ask your husband to take the car nine miles over to Newport to see Judge Gilkey about the insurance? A. No.

Q. Did your husband drive over to Newport to see about the insurance? A. No.

Q. You knew there was an office in Newport, did you not? A. I did not.

Q. Did you look in the phone book to see whether or not there was an office in Newport? A. No.

Q. The company you got in Toledo was the State Farm Mutual, was it not? A. I think so.

Q. You knew that the Farmers Insurance Exchange had a big office in Portland?

A. No, I didn't.

Q. Did you check to see whether or not they had an office in Portland? A. No, sir. [89]

Q. Did you write to Mr. Lawrence and Mr. Moon and ask where the agent was?

A. No.

(Testimony of Helen L. Sondenaar.)

Q. Did you talk to Mr. Lawrence at any time before the accident? A. No, I didn't.

Q. Did you talk to or discuss with any representatives of Farmers any features of this insurance question prior to the accident?

A. Prior to the accident?

Q. Yes. A. No.

Q. The only one of Farmers' representatives that you had any contact with at all has been Mr. Patterson? A. That is right.

Q. The policy has been in your possession all the time?

A. It was in my possession after I took the car.

Q. And then from that time on until your husband gave it to Attorney Nash? A. Yes.

Q. Did you read that policy at any time before the accident?

A. I looked it over; I looked it through.

Q. When your husband wrote to Mr. Moon, did he tell him that title had been transferred, do you know? A. I don't know.

Mr. Gearin: At this time, your Honor, we would like to offer in evidence Exhibits 16 and 17, the statements of the witness, [90] which have been already identified.

Mr. Prendergast: No objection.

The Court: Admitted.

(Statement signed by Helen L. Sondenaar, dated Toledo, Oregon, November 18, 1948; and Statement signed by Helen L. Sondenaar, To-

(Testimony of Helen L. Sondenaar.)

ledo, Oregon, November 18, 1948, heretofore marked for identification, were thereupon received in evidence as Defendant's Exhibits 16 and 17, respectively.)

Mr. Gearin: I think that is all.

(Witness excused.)

Mr. Prendergast: We are ready to rest, your Honor, save and except for a witness on attorneys' fees.

The Court: You can put him on later. [91]

Defendant's Testimony

WILLIAM LAWRENCE

was thereupon produced at a witness on behalf of Defendant and, being first duly sworn, was examined and testified at follows:

Direct Examination

By Mr. Gearin:

Q. Your name is William Lawrence?

A. That is right.

Q. Where do you live?

A. The Dalles, Oregon.

Q. What is your occupation?

A. I am District Agent for the Farmers Insurance Group.

The Court: What is the title?

A. District Agent for the Farmers Insurance Group.

(Testimony of William Lawrence.)

The Court: What does that mean?

A. That means that I represent the Farmers Insurance Group, as agent, to solicit business and accept premium money on new business or old business that is being renewed.

The Court: For what district?

A. District 12, Oregon.

The Court: How many others are there, do you know?

A. No, I don't.

The Court: Do they have a General Agent or anybody by that title in Oregon?

A. I can't answer that. [92]

The Court: You don't know that? Whom do you report to?

A. I have a sales supervisor that I report to.

The Court: How long have you been District Agent?

A. Since March 15, 1948.

The Court: Go ahead. Did you state what your district was?

A. District 12.

The Court: What territory is that?

A. That comprises Wasco and Sherman Counties.

The Court: Those two counties?

A. Yes.

Q. (By Mr. Gearin): Mr. Lawrence, do you know Mr. A. von Borstel? A. I do.

Q. Did you see him any time in the spring or summer of 1948?

(Testimony of William Lawrence.)

A. Yes, in the early summer of 1948.

Q. Can you remember the approximate date?

A. No; probably in June.

Q. Where did you see Mr. von Borstel and under what circumstances?

A. He came into my office, in a used car sales building in The Dalles.

Q. How big an office did you have?

A. It was about 10 by 10.

The Court: Is that your sole and exclusive business, being District Agent for this company?

A. Yes.

Q. (By Mr. Gearin): What was the meeting with Mr. von Borstel about? [93]

A. Mr. von Borstel came in to discuss the possibility of changing his car or giving his car to his daughter, and questions pertaining to the insurance in the event he did make the change.

Q. What did Mr. von Borstel say to you and what did you say to Mr. von Borstel?

A. Mr. von Borstel asked me about the possibility of turning this car over to his daughter, if she came up to get it, and I told him if she were to take the car and if he was to retain possession of the title that the car would be insured under his policy and he could continue to pay premiums, and the insurance would be good, if she were the driver with his permission.

There was some discussion also about the possibility of him taking the car to them, which was in Western Oregon and which I understood at the time

(Testimony of William Lawrence.)

would be in Western Oregon in the neighborhood of Toledo. I told him in that case that the agent down here—as I recall, I stated the agent's office in Corvallis was, I knew, on Monroe Street, between 2nd and 3rd Streets, but I didn't know the agent's name.

Q. Was there anything said about transferring the title to the automobile, with regard to the insurance?

A. Yes. I told Mr. von Borstel that if the title was changed the signature of the applicant—the name of the new applicant would have to appear on the application form, and that the insurance did not go with the car otherwise.

Q. Did he advise you whether or not his daughter was married? [94]

A. Yes, he did.

Q. Did he tell you his daughter's married name?

A. Not that I recall. I wouldn't know for sure.

Q. Did Mr. von Borstel say whether or not he intended to transfer the title or whether he was just thinking about it?

A. I believe he said he was intending to transfer title. However, that wasn't definite.

Q. When did you first know the car had been transferred?

A. I had no definite knowledge of it until after I heard of the accident.

Q. Do you recall when you heard of the accident?

A. My first knowledge of the accident was when one of the company's adjusters came into my office

(Testimony of William Lawrence.)

on his way to Mr. von Borstel's residence to take a statement.

Q. Was that Mr. Chuck Daly?

A. It was Mr. Daly; yes, sir.

Q. I am now handing you Exhibit 15, also Exhibit No. 22, and will ask you if you can identify Exhibit 22 with reference to Exhibit 15? What is Exhibit 22?

A. Exhibit No. 22 is a quiz form that we use for correspondence between the District Office and the agent's office and the Portland Branch Office.

Q. Is that in your handwriting and does it bear your signature? A. It is.

Q. Do you recall the occasion for writing that memo? [95]

A. Not very clearly, because the names involved on this enclosure, Exhibit 15, and also which I have written at the top and listed as the insured, were not known to me at that time. I wasn't able to identify them.

Q. Do you recall having received or having seen Exhibit 15? A. Yes.

Q. Under what circumstances did you first see it?

A. I received it in the mail.

Q. From whom, do you know?

A. Mr. Moon.

Q. What did you do with Exhibit 15?

A. It was attached to this Exhibit 22 and sent in to Portland.

Q. At the time you received Exhibit 15, did you know who Mr. Sondenaa was? A. No.

(Testimony of William Lawrence.)

Mr. Gearin: May we have Exhibit 22 received in evidence?

Mr. Prendergast: No objection.

The Court: Admitted.

(Copy of Interoffice Memorandum dated October 8, 1948, from Bill Lawrence to Northwest Branch, Farmers Automobile Insurance Exchange, heretofore marked for identification, was thereupon received in evidence as Defendant's Exhibit 22.)

Mr. Gearin: You may cross-examine. [96]

Cross-Examination

By Mr. Prendergast:

Q. Why do insurance policies of the Farmers Group have numbers on them?

A. I think that insurance policies of all insurance companies have numbers on them, to identify them, for identification or filing purposes.

Q. You spoke of being the District Representative of the Farmers Group. Is there any difference between the Farmers Group and the Farmers Inter Insurance Exchange and the Farmers Insurance Exchange?

A. Yes. The Farmers Insurance Exchange, along with the Truck Insurance Exchange and the Fire Insurance Exchange comprise the Farmers Insurance Group.

Q. The Group is the family name?

A. I would assume that, yes.

(Testimony of William Lawrence.)

Q. The Farmers Insurance Group, that applies to all companies? A. Yes.

Q. They are all combined together—made up of the Truck Insurance Exchange and the Farmers Insurance Exchange and the Farmers Inter Insurance Exchange?

A. No, the Farmers Insurance Exchange, the Truck Insurance Exchange and the Fire Insurance Exchange. I cannot give you the date, but sometime in the not-too-distant past the Farmers Inter Insurance Exchange was dropped; that title was dropped, the [97] “Inter” part of the title was dropped.

Q. So it is now called the Farmers Insurance Exchange? A. Yes.

Q. The Farmers Inter Insurance Exchange is the same company, but has changed its name?

A. That is correct, as far as I know.

Mr. Prendergast: Would you hand the witness Exhibit No. 4, the policy?

(Exhibit No. 4 handed to the witness.)

Q. I think the slip attached to that policy, the second rider as it is called, is a note saying that that policy is a non-assessable policy, is that correct?

A. Yes. “The within-described policy is hereby re-issued and declared to be non-assessable.”

Q. Was that about the time the company changed from the “Farmers Inter Insurance Exchange” to the “Farmers Insurance Exchange”?

A. I don’t know that. That is prior to my association with the company.

Q. Is the financial responsibility on a non- assess-

(Testimony of William Lawrence.)

able policy different than the financial responsibility on an assessable policy?

A. I couldn't answer that, either.

Q. You don't know? A. No.

Q. Mr. Lawrence, before this particular day, which you say was [98] in the summer of 1948, when Mr. von Borstel walked into your 10 by 10 office, you had never seen the gentleman before, had you?

A. Not to know him as Mr. von Borstel, no.

Q. So, as far as business was concerned, he was a complete stranger to you?

A. That is correct.

Q. When he came into your office and introduced himself as Mr. A. von Borstel, did he identify himself as being a policyholder in the Farmers?

A. Yes.

Q. Did he tell you the number of his policy?

A. I couldn't say whether he did or not.

Q. Did he show you the policy?

A. He didn't have the policy with him that I know of.

Q. You have a master list of policy-holders?

A. Yes, we have a folder filing system.

Q. Right there in the District Office?

A. Yes.

Q. So, by any number that is given you, you can tell whether he was a policy-holder, if he gave you the number of the policy?

A. I could look it up under his name in the alphabetical file, and that number should be attached to the folder and the policy.

(Testimony of William Lawrence.)

Q. Did you look it up at that time?

A. I think so. [99]

Q. Did you ascertain how many insurance policies he held with the Farmers?

A. I knew he had more than one.

Q. How did you know that?

A. Because they were in the file, besides the other one appearing under his name.

Q. So, when he came in, you did look up the file?

A. That is right.

Q. He explained to you the reason that he came was for the purpose of discussing with you the coverage of an automobile he was about to give his daughter? A. Yes.

Q. He did not discuss with you how he was going to transfer title? He discussed the insurance on the automobile, didn't he?

A. I think that is the reason he came into the office.

Q. In other words, he did not ask you how he could transfer title to the car?

A. No, he didn't ask me how he could transfer title to the car.

Q. He asked you how to protect the car?

A. That is right.

Q. So that the purpose, so far as you knew, of Mr. von Borstel coming into your office on that day was to get information from you as to how he would protect his automobile? A. That is correct.

Q. And he said he was going to give this car to his daughter? [100] A. Yes.

(Testimony of William Lawrence.)

Q. Did he say when he first came he was going to transfer title or sell the car?

A. As I recall it, the subject of transferring title was not mentioned.

Q. Did you explain to him—when you said it required his daughter's endorsement on the application, did you give him an application to make that endorsement on? A. No, I didn't.

Q. Did you have those forms in the office?

A. Yes.

Q. Why didn't you give him one?

A. Because his daughter's signature would be the one I would have to get and she wasn't there.

Q. Couldn't he have taken the form for her to sign? A. That is not our policy.

Q. You mean everybody has to come to the office of Farmers before they can do anything in regard to a policy?

A. The agent makes out the application form.

Q. Isn't it true with Farmers in all respects? The agent is the only one that can make out anything in regard to an application for a change of policy? A. Yes, sir.

Q. No policy-holder in Farmers has the right to make an application; you have to go to an agent to have that done, is that right? [101]

A. There are exceptions, I believe.

Q. There are exceptions?

A. A policy-holder might write a letter—

Q. That would be considered an application?

A. —requesting a change of one car from an-

(Testimony of William Lawrence.)

other, and that change can be made without the insured's signature.

Q. You looked up Mr. von Borstel's file and you found how he had made two applications to the Farmers to change policies? A. I don't know.

Q. You don't know?

A. I don't know for sure, no. I do know he has changed cars in the past, yes.

Q. Did he have some agent make a formal application on those? A. I would presume so, yes.

Q. You just presume so; you don't know?

A. Mr. von Borstel could have a change of car made; that would be included in this exhibit.

Q. Could a policy of insurance include another insured on the policy? A. No.

Q. In other words, if a woman owned an automobile and wanted her husband's name on the policy, could an agent make that change?

A. That would not be necessary.

Q. Why?

A. Because a spouse is automatically covered under the policy, as [102] I understand it.

Q. Suppose a boy came home from college and the father wanted his car protected, could an agent make that change, add the boy's name to the policy?

A. Under the provisions of the policy if the boy was driving with permission, there would be coverage.

Q. You are familiar with these policies?

A. Relatively.

Q. Is there anything in the policy that makes

(Testimony of William Lawrence.)

any provision for changing the policy upon transferring title to the car? Is there any provision anywhere in this policy with regard to transferring title of the car? A car covered under that policy?

A. I don't know. I don't think so.

Q. You have never found such a provision, have you? When a fellow sells a car, what happens to the policy? It does not say the policy is cancelled, does it? There is no provision for cancellation upon the sale of a car under this policy, is there?

A. Not that I know of.

Q. You did not give Mr. von Borstel any form? Did you tell him he would have to bring his daughter in to an agent and sign it?

A. Yes.

Q. He said if the daughter came up, she would come into The Dalles office?

A. That is right.

Q. If the father took the car down to Toledo, they could go in to [103] the agent at Corvallis. How far is Corvallis from Toledo, do you know?

A. About 45 miles, 50 miles.

Q. Did you tell the father that if the title remained as it was the daughter would be covered in operating that car?

A. I think I did.

Q. And the son-in-law?

A. Yes.

Q. Did Mr. von Borstel tell you that he had just bought a new automobile?

A. I think he did; either that he had just bought it or was buying it.

Q. Did he tell you why he was giving the car away, the 1940 Plymouth? Did he tell you why he was giving it away?

(Testimony of William Lawrence.)

A. That he wanted his daughter to have it.

Q. And that he had bought a new automobile himself? A. Yes.

Q. Did he tell you or inform you where the car was at the time he was talking to you?

A. I couldn't say for sure, although I have the impression that it was at home, in Sherman County.

Q. That he had it? A. That he had it.

Q. He didn't tell you that it was across the street being worked on, did he? [104]

A. I can't recall.

Q. Did he ask anything about coverage on the new automobile he was buying?

A. I don't know that for sure.

Q. You had nothing to do with the accident in any respect, other than the fact you received through the mail this Exhibit 15?

A. That is right.

Q. How did you happen to get it?

A. How did I happen to get it?

Q. Yes. A. Mr. Moon sent it to me.

Q. Mr. Moon received it and sent it to you?

A. Yes.

Q. Who is Mr. Moon?

A. Mr. Moon is a business man in Wasco. He formerly had been the Farmers Insurance agent.

Q. Was he under you as District Manager?

The Court: Just a minute. What title is that?

Mr. Prendergast: District Agent.

The Court: Is that what he said?

Mr. Prendergast: I believe that is his testimony.

(Testimony of William Lawrence.)

Q. Is that correct? You are the District Agent?

A. District Agent is what I said, yes.

Q. The District Agent for the Farmers Insurance Group, you testified? [105] A. Yes.

Q. Did Mr. Moon know you were the District Agent for the Farmers Insurance Group and send you the letter reporting the accident?

A. That is right.

Q. You then appended it to the form and sent it to the Portland District Office—you call that the District Office?

A. Yes, the Northwest Branch Office. I suppose it would be properly referred to as the Portland Area.

Q. This Exhibit 22, this form, by which you transmitted the letter sent by Mr. Moon, that was mailed by you, was it not?

A. Yes, that would be included in my mail to the company.

Q. You are reasonably sure that in due course the company received that? A. Yes.

Mr. Prendergast: That is all.

Mr. Gearin: Nothing further.

(Witness excused.) [106]

J. H. PORTH

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified at follows:

Direct Examination

By Mr. Gearin:

Q. Your name is J. H. Porth? A. Yes.

Q. What is your occupation?

A. Assistant Branch Claims Manager for the Farmers Insurance Exchange.

Q. How long have you been connected with the Exchange? A. Fourteen years.

Q. What was your capacity and your position in the fall of 1948?

A. The same as it is now, Assistant Branch Claims Manager.

Mr. Gearin: I wonder if the witness could be handed Exhibits 15 and 22.

(Exhibits 15 and 22 were handed to the witness.)

Q. (By Mr. Gearin): There has been handed to you Exhibit No. 15, also Exhibit No. 22. Have you seen those instruments before? A. Yes.

Q. When did you see them and how did you get them?

A. Well, they came in via mail from Bill Lawrence, our District Agent or District Manager at The Dalles. According to the stamps here, they were received on October 11, 1948.

Q. What did you do upon receipt of Exhibit No.

(Testimony of J. H. Porth.)

15, which is the [107] letter from Mr. Sondenaa?

A. These two came in together.

Q. What did you do when you received them, Mr. Porth?

A. Well, the letter from Mr. Sondenaa starts out by giving us the policy number, 2098402, and he recites the facts of an accident in which he was involved and signs it "Elmer N." or "Elmer W. Sondenaa, Box 716, Toledo, Oregon," and then that was sent in by Mr. Lawrence, and in the caption where it says "Insured" it says "Elmer H. Sondenaa," so I, upon receipt of this correspondence, checked that with what we call the "ABC." That is our alphabetical record of all policy-holders in the Northwest.

Q. What name did you check it for?

A. Well, I checked it for "Elmer H. Sondenaa," with the address, Box 716, Toledo, Oregon.

Q. The result of that search af your ABC record?

A. We found a record where we had an E. G. Sondenaa, Camp 12, Toledo, Oregon, who had had insurance with the Farmers Insurance Exchange back in 1934, but the policy had either been dropped or cancelled sometime prior to 1945, because we do not keep our records of cancelled policies over three years.

Q. Did you do anything in connection with the policy number which appears on Exhibit 15?

A. Yes.

Q. What?

(Testimony of J. H. Porth.)

A. I had the girl pull our policy file on this policy, No. 2098402, [108] and it showed, according to our records under that policy, that we had a Mr. A. von Borstel of Kent, Oregon, as assured.

Q. Anything in the files to indicate a transfer of title to the automobile covered by Mr. von Borstel's policy? A. No.

Q. Subsequent to that time did you have any communication from Attorney Weinstein?

A. Yes.

Q. What was the nature of your discussions or conversations with Mr. Weinstein?

A. Well, I recall the first discussion with Mr. Weinstein of this matter was over the telephone.

Q. What was the first thing you knew, or what was the first information you had that there was any relationship or connection, I should say, between A. von Borstel and Elmer Sondenaar?

A. That information was given to me by Mr. Weinstein.

Q. Do you recall the date?

A. According to the memory, the date is November 10th, I believe.

Q. What information did you receive from Attorney Weinstein relating to the connection between von Borstel and Sondenaar?

A. Well, the information Mr. Weinstein gave me was that the car that was involved in this accident was the one which we, according to our records, had supposed was in possession of and being operated by Mr. von Borstel. [109]

(Testimony of J. H. Porth.)

Q. Mr. Porth, I am handing you Defendant's Exhibit 20 and will ask you if you can identify that letter, please?

A. Yes, I remember these letters.

Q. Is that the letter you received from Attorney Weinstein? A. Yes, it is.

Mr. Gearin: We will ask that that be received in evidence as Exhibit No. 20.

The Court: Admitted.

Mr. Prendergast: What is the date of the letter, please?

A. November 15, 1948.

Mr. Prendergast: No objection.

The Court: Admitted.

(Letter dated November 15, 1948, Nathan Weinstein, Attorney-at-Law to Farmers Automobile Inter Insurance Exchange, heretofore marked for identification, was thereupon received in evidence as Defendant's Exhibit No. 20.)

Q. (By Mr. Gearin): This telephone conversation you had with Mr. Weinstein, when was that with relation to the letter identified as Exhibit 20?

A. I believe he called me on the phone at about the same time and discussed the matter.

Q. Do you recall whether you had the telephone call or telephone conversation before receiving the letter or not? A. I believe I did. [110]

(Testimony of J. H. Porth.)

Q. As soon as you received the information from Mr. Weinstein that this automobile was the automobile described in Mr. von Borstel's policy, what did you do?

A. Well, I called Mr. Tomlin, who was at that time our Branch Claims Manager in Eugene, and asked him to have one of the adjusters from the Eugene office contact Mr. and Mrs. Sondenaa who were living at Toledo, and discuss the matter with them and ascertain more facts as to the circumstances under which they were in possession of the automobile.

Q. What did you do about sending anyone up to Mr. von Borstel?

A. I sent Chuck Daly from our Portland office up to The Dalles, to get this thing investigated in The Dalles—obtain some information from Mr. von Borstel.

Q. Do you know who went over from the Eugene Branch Claims Office to see the Sondenaas?

A. Patterson.

Q. What was Mr. Patterson's position with the Exchange? A. He is a staff adjuster.

Q. Do you know what authority is extended to a staff adjuster? A. None.

Mr. Gearin: I think that is all.

Cross-Examination

By Mr. Prendergast:

Q. When an accident is reported, involving a

(Testimony of J. H. Porth.)

policy-holder, [111] how many people have charge of that particular accident, to investigate it?

A. I am the man who sends out the adjuster.

Q. You are the man? A. Yes.

Q. Your testimony is that you received, about October 11, 1948, from Mr. Lawrence, this transmittal of a letter from Sondenaa, bearing the policy number, sent to Lawrence and sent in to you. That is the first knowledge you had of this accident?

A. That is right.

Q. The next knowledge you had was on November 15th, when you received a letter, and, concurrently, had a telephone conversation with Mr. Weinstein?

A. That conversation with Mr. Weinstein is when we first had knowledge that the automobile, according to our records, was owned by Mr. von Borstel and was the automobile involved in the accident.

Frequently we receive letters from people and, come to find out, they are insured with the State Farm Mutual Insurance Company. The names are somewhat similar. I think Mr. Weinstein—if he will recall, I mentioned that possibility to him. That is the reason we got this letter from the State Farm Mutual agent down at Toledo.

Q. Let's get back to the point. The first time you knew that there was any question about whose name that car was in was when [112] you talked to Mr. Weinstein on the telephone on the 15th of November? A. Somewhere around there, yes.

(Testimony of J. H. Porth.)

Q. Then you received a letter from Mr Weinstein, which has been marked here as an exhibit.

A. Yes. I believe that letter was more or less in confirmation of our telephone conversation.

Q. Who sent Mr. Patterson down to Toledo, Oregon, to take a statement from Mr. Sondenaa on the 10th of November, five days before you had this conversation, and why did he go down?

A. On the 10th of November, Weinstein gave me the information.

Q. What date? A. Around the 10th.

Q. You just testified it was around the 15th, the date of that letter.

A. I said before it was around the 10th.

Q. You are changing your testimony to the 10th, now? A. No.

Q. When was it you talked to Weinstein?

A. It must have been somewhere around the 10th, because I never sent anybody down until he told me over the phone.

Q. However, Mr. Patterson took a statement——
Mr. Gearin: It is No. 12.

Mr. Prendergast: Could we hand this Exhibit No. 12 to the witness. [113]

(Exhibit No. 12 was handed to the witness.)

Q. Do you know Mr. Patterson's handwriting?

A. No, I can't say that I do.

Q. You never read any of his reports?

A. Mr. Patterson is stationed down at Eugene. I have always worked here in Portland.

(Testimony of J. H. Porth.)

Q. Who sent Mr. Patterson from Eugene over to Toledo? A. Mr. Tomlin.

Q. Mr. Tomlin? A. Yes.

Q. Did you know that? A. Yes.

Q. You knew ahead of time, before Mr. Patterson went from Eugene to Toledo to take the statement, that Mr. Patterson was going down to take the statement? A. Yes.

Q. Did you read the statement Mr. Sondenaa gave him at that time? A. No.

Q. Never have? A. No.

Q. If you had read it, you would have found out what anyone would, that he made the statement on the 10th?

A. That is the day Mr. Weinstein here—either that day or the day before—told me about von Borstel, that von Borstel was [114] involved in this.

Q. You want to move this up from the 15th to the 10th, now? Now you want to make it earlier than the 10th?

A. It could be the 10th, the same day.

Q. It could be before the 10th, couldn't it, too?

A. No; maybe one day before—I don't know.

Q. Do you know how Tomlin happened to send Mr. Patterson from Eugene to Toledo?

A. I don't know that exactly. Maybe Patterson was already down there. He is the territory adjuster. He may have been there in Toledo.

Q. How did anybody happen to know that Farmers were taking a statement from Mr. Sondenaa at Toledo on the 10th of November?

(Testimony of J. H. Porth.)

A. Weinstein either gave me the information that von Borstel was involved——

Q. Weinstein gave you the information about the 10th of November that Mr. von Borstel was involved?
A. Yes.

Q. And immediately you contacted Mr. Tomlin on the 10th?
A. Yes.

Q. And Mr. Tomlin then contacted Mr. Patterson, and Mr. Patterson then either was in Toledo or went to Toledo?
A. That is right.

Q. On the 10th of November, then, Farmers knew all about the title to the car? [115]

A. No, we didn't. That is the reason we sent those boys out to get this statement.

Q. When Patterson got the statement, did you ever read it?
A. No, I can't say that I did.

Q. Have you ever seen it before?

A. It has been in our file all the time, yes.

Q. This is a \$12,000 lawsuit and you never read the statement taken from Sondenaa. Why weren't you interested?

A. This file I did not handle. Our Claims Manager had handled it.

Q. As a matter of fact, you don't know anything about this case, do you?
A. Oh, yes, I do.

Q. What do you know about it?

A. Ask me.

Q. Do you know anything about the statement taken from the man who was driving the car at the time of the accident? You never read this or were not interested in it?

(Testimony of J. H. Porth.)

A. I knew statements were taken. I know what the picture was of it.

Mr. Prendergast: That is all.

(Witness excused.) [116]

The Court: Ladies and Gentlemen, we will have to adjourn this case until tomorrow morning. We just hope we can get through without detaining you all day. Is there anybody who cannot be here at 9:00 o'clock in the morning? Well, then, we will adjourn until 9:00 o'clock tomorrow morning.

(Thereupon an adjournment was taken until 9:00 o'clock a.m., Saturday, June 17, [117] 1950.)

(Court reconvened at 9:00 o'clock a.m., Saturday, June 17, 1950.)

The Court: This attorneys' fee matter, is it to be submitted to the jury or handled by stipulation after the verdict?

Mr. Young: I understood, your Honor, that would be heard after the decision by the jury.

The Court: Do you want to do it that way?

Mr. Prendergast: Yes.

WILLIAM PATTERSON

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

(Testimony of William Patterson.)

Direct Examination

By Mr. Gearin:

Q. Your name is William Patterson?

A. Yes.

Q. By whom are you employed?

A. The Farmers Insurance Group.

Q. In what capacity? A. As an adjuster.

Q. Where do you reside?

A. In Eugene, Oregon.

Q. Are you the individual who went to Toledo to obtain statements from the Sondenaas in connection with this subject matter?

A. Yes, sir, I am.

Q. I understand a statement was obtained first from Mr. Sondenaa and a second time, eight days later, a statement was obtained from Mrs. Sondenaa?

A. Yes.

Q. On either of those occasions on meeting Mr. and Mrs. Sondenaa did you make any statement regarding the question of coverage?

A. No, sir, I didn't.

Q. What was your purpose in going to Toledo to obtain statements from the Sondenaas?

A. To determine the facts of the accident and also determine ownership of the vehicle involved.

Q. At that time did you make any statement to either of them, on either of those two occasions, with regard to whether or not the Farmers was or was not defending claims that had been brought against them?

(Testimony of William Patterson.)

A. I gave them my statement of the fact that I didn't know.

Q. Didn't know what?

A. Whether or not they would be covered and defended.

Q. What, again, is your position with the Farmers? A. I am an adjuster.

Q. Are there many other adjusters in Eugene, Oregon? A. Yes, sir; seven or eight.

Q. Is there a Claims Manager at Eugene? [119]

A. Yes, there is.

Q. At the time you went out to Toledo to obtain the statements, who was the Claims Manager at Eugene? A. Mr. James M. Tomlin.

Mr. Gearin: That is all. You may inquire.

Cross-Examination

By Mr. Prendergast:

Q. When did you go to Toledo from Eugene?

A. My first visit was on the 10th of November.

Q. Did you leave Eugene on the 10th and go to Toledo? A. I don't remember that.

Q. When were you instructed to go to Toledo?

A. Most likely a day before my visit there.

Q. So the 8th or 9th of November you were instructed to go to Toledo and get statements?

A. I am surmising that because I can't remember when I got instructions to see these people.

Q. Who instructed you to go to Toledo?

A. Mr. Tomlin.

Q. Mr. Tomlin? A. Yes.

Q. By telephone?

(Testimony of William Patterson.)

A. More than likely it was in conversation between us in the office in Eugene. [120]

Q. Was Mr. Tomlin in Eugene?

A. He was, sir, at that time.

Q. Mr. Tomlin sent you down to Toledo to take statements from the Sondenaas? A. Yes, sir.

Q. Did he give you any written instructions?

A. No.

Q. Did he give you any documents or reports of the accident at all?

A. Yes, I was given what we know as field files, the field file.

Q. The field file? A. Yes.

Q. Do you have the field file with you?

A. No, sir; I don't.

Q. Who has the field file?

A. Since our investigation was completed, it was consolidated with the master file, and the field file, where there was duplication, has been destroyed.

Q. Probably destroyed, you say? A. Yes.

Q. This field file, with all the information that the insurance company had in regard to this accident, you say that has been destroyed?

Mr. Gearin: That is not what he said.

A. Just the duplicate copies. [121]

Q. (By Mr. Prendergast): Please?

A. Just the duplicate or triplicate copies. Usually the duplicate or triplicate copies are the only things that are destroyed.

Q. Did you take that with you when you went to Toledo? A. Yes, I did.

(Testimony of William Patterson.)

Q. What was the purpose of taking the field file with you?

A. To give the adjuster something with which to work. If he has 15 or 20 cases, he certainly cannot carry all of it in his head.

Q. What facts were you given in regard to this particular matter when you went to Toledo?

A. I was informed that the Sondenaas had been involved in an accident and I was asked to go and get their statement.

Q. Were you given the information as to where the accident occurred and when it occurred?

A. Yes, I knew that.

Q. And who was driving the car?

A. Yes, sir.

Q. And the number of the policy?

A. I believe the number of the policy, yes.

Q. You had never met the Sondenaas before that visit?

A. No, I hadn't.

Q. On that occasion, on the 10th of November, you took a statement from Mr. Sondenaa?

A. Yes, sir.

Q. Was Mrs. Sondenaa present? [122]

A. Yes, she was.

Q. This statement was written up by you and signed by Mr. Sondenaa, I believe, the statement that is in evidence here?

A. Yes.

Q. At that time did Mr. Sondenaa give you any document, letters or other written information regarding the accident?

A. I believe he did.

Q. What did he give you, Mr. Patterson?

(Testimony of William Patterson.)

A. A letter or possibly two letters from Mr. Weinstein.

Q. From Mr. Weinstein? A. Yes.

Q. Why did he give you those letters?

A. There was a question of whether the Exchange would cover and defend the Sondenaa family without loss.

Q. Did you inform Mr. Sondenaa of that?

A. Yes. That was my purpose in taking the second statement.

Q. I am speaking now of the first statement, on November 10th.

A. I am referring to the second statement taken November 10th.

Q. To the second statement taken on the 10th?

A. Yes.

Q. What do you mean by that? Did you take two statements on the 10th? A. Yes, sir; I did.

Q. From Mr. Sondenaa? A. Yes. [123]

Q. Why did you take two statements instead of one?

A. Well, covering two different phases of the investigation; one, the facts of the accident and, the other, the ownership of the vehicle.

Q. Did you request of Mr. Sondenaa these letters of Mr. Weinstein?

A. I don't remember whether I requested them or not.

Q. After you left the Sondenaa's, or when you left, what instructions did you give Mr. Sondenaa?

A. I told him to keep us advised of any further

(Testimony of William Patterson.)

communications that he might receive. I didn't instruct him to forward those to us.

Q. Where did you tell him to advise you of any further developments?

A. I may or may not have given him my business card. I don't remember.

Q. You informed him you were from the Eugene office? A. Yes.

Mr. Prendergast: That is all.

(Witness excused.)

The Court: Do you have three statements?

Mr. Gearin: We have two statements taken from Mr. Sondenaa on the 10th of November and two from Mrs. Sondenaa on the 18th. In each instance there is one statement as to the facts of the [124] accident and a second in regard to the ownership of the automobile.

• J. M. SMITH

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Young:

Q. Will you state your name to the jury, please?

A. J. M. Smith.

Q. Do you live in Portland? A. I do.

Q. What is your occupation, Mr. Smith?

(Testimony of J. M. Smith.)

A. I am Northwest Branch Manager, Ladies and Gentlemen, of the Farmers Insurance Group.

Q. Will you tell the jury what the term "Farmers Insurance Group" means?

A. It is the term that applies to three separate insurance organizations, the Farmers Insurance Exchange, the Truck Insurance Exchange, and the Fire Insurance Exchange.

Q. In the case of insurance issued on passenger automobiles, which of those exchanges has control?

A. The Farmers Insurance Exchange.

Q. What are your general duties?

A. To direct the operation of those organizations in the four [125] Northwest States; Oregon, Washington, Idaho and Montana.

Q. How long have you been connected with the Farmers Insurance Group?

A. The 1st of November it will be twenty years.

Q. How long have you been associated with the Farmers Group in your present capacity?

A. About four and a half years, as Branch Manager.

Q. That is in Oregon? A. Here in Oregon.

Q. Are you familiar with whether or not there is a District Agent in Toledo or the Newport area?

A. Newport, Oregon?

Q. Yes.

A. Yes, Judge Gilkey is the District Agent there.

Q. How long has Judge Gilkey been in that area?

A. Oh, I would say fourteen or fifteen years.

(Testimony of J. M. Smith.)

Q. How does he happen to have the title as "Judge"? Are the members of your organization called judges?

A. No. He also is County Judge down there, as well as the representative of our organization.

Q. Is he well-known in that community?

A. Yes.

Q. Does the Farmers Insurance Group have an office down there, either at Toledo or Newport, Oregon?

A. In Newport, Oregon. [126]

Q. In Newport? A. Yes.

Q. That is the headquarters of Judge Gilkey?

A. That is right, sir.

Q. Has that office been maintained there during all the time Judge Gilkey has represented your organization?

A. Yes, he has had an office there all the time.

Q. Does the name "Farmers Insurance Group" appear in the local telephone directory?

A. It does.

Q. Are you acquainted with Mr. Lawrence of The Dalles, who has been identified here as the District Agent for the Farmers Insurance Group in that city?

A. Yes, I am.

Q. How long have you known him?

A. Possibly three years.

Q. What is his authority as representative of the Farmers Insurance Group?

A. Well——

Mr. Prendergast: I am going to object to that question. I do not see the materiality of it at all and I object to it as being incompetent, irrelevant and immaterial, wholly immaterial.

(Testimony of J. M. Smith.)

The Court: Objection overruled.

Q. (By Mr. Young): Answer the question.

A. His duties are to solicit insurance in the two counties [127] assigned to his District and to service policy-holders.

Q. Does he have authority to make collection of premiums? A. Oh, yes.

Q. Does his authority extend beyond the limits of either of the two counties in which he is agent?

A. No. He is assigned that area.

Q. What counties are those?

A. Well, it is the county that The Dalles is in. I can't recall the name of the county.

Q. Sherman and Morrow, is that right?

A. Sherman and Morrow.

Q. The Wasco area?

A. Wasco, yes. They are adjoining counties there.

Q. Does the District Agent at The Dalles, who, in this case, is Mr. Lawrence, have any authority whatsoever to alter or change the terms of any insurance policies issued by the Farmers Insurance Group?

Mr. Prendergast: Objected to, your Honor.

The Court: The objection is overruled.

A. No, he does not.

Q. (By Mr. Young): Is there anyone in the State of Oregon who would have such authority?

A. No—yes, to issue endorsements or waivers. The underwriters in the Portland office have that authority.

(Testimony of J. M. Smith.)

Q. Is Portland the only place where there is anyone who would [128] have that authority?

A. The only place in the Northwest territory.

Q. There is an office of the Farmers Insurance Group in Portland, of course? A. Yes.

Q. Where is that located?

A. 18th and Sandy, here in Portland.

Q. That is the large building at that particular place? A. 18th and Sandy Boulevard, yes.

Q. The Bailiff has handed you Exhibit 23, which has already been identified, and which is a form of application for insurance. The document which the Bailiff has just handed you, Mr. Smith, contains, on one side, a great many questions.

Will you tell the jury what that document is for?

Mr. Prendergast: I would like to object to this entire line of testimony, your Honor. This document the witness holds in his hand is a blank. What its relevancy is to this case I cannot possibly see. I would like to at least have the record show that we are objecting to it as being incompetent, irrelevant and immaterial.

The Court: He may answer.

A. The application has two purposes: In the solicitation of insurance, to determine the applicant's name, the address, description of the car, the coverage that is desired, whether or not there is a mortgage on the vehicle that is being insured, and [129] *so and so forth*. Then, on the back side, at the top, is a place for the agent's report, and there are many questions that have to do with whether or not the

(Testimony of J. M. Smith.)

applicant is acceptable to the company as a risk for insurance.

Q. (By Mr. Young): Why are those questions asked of the applicant?

A. Not everyone is acceptable as a risk. People with physical defects that might affect their driving ability are not acceptable. People who have bad driving records are not acceptable as risks. People who have been arrested for driving while intoxicated or for reckless driving are not acceptable, and then some people are under age and are not acceptable. Some are over age and not acceptable.

Q. Do any one of the insurance exchanges ever issue a policy unless one of these forms has been filled out and has been accepted by the company?

A. No, this is required in every case.

Q. Is there any circumstance under which a policy held by one person can be transferred to another person, without such a form being filled out?

A. No. It must be filled out.

Q. There is testimony in this case that the agent of the Exchange at The Dalles made some comment to the effect that this policy could be transferred from the father to the daughter, if the car remained in the family. Is there any practice of the Exchange [130] on that subject?

A. Yes. A policy, under certain conditions, may be transferred from one member of an immediate family to another member of that family, and the condition is that they reside in the same household.

Q. Would it ever be the practice or would it ever

(Testimony of J. M. Smith.)

be permissible for one of these policies to be transferred, say, from the father to a daughter, when they are maintaining separate households, the daughter being married and living 250 miles away?

A. No, that would not be allowable or acceptable for transfer.

Q. In a case where the transfer is made to a person who is related to the holder of the policy, but is not a member of the family, would the policy itself be transferred or would there have to be a new policy issued?

A. There would have to be a new policy issued.

Mr. Young: That is all.

Cross-Examination

By Mr. Prendergast:

Q. Mr. Smith, in answering these questions you have said that certain things are necessary, that certain things must be done. Where did you get those requirements? Where are those requirements stated? Are they in the policy?

A. Some are in the policy and some are in the Manual that we file with the Insurance Department in this state. [131]

Q. Do you have a copy of the Manual with you?

A. No, sir; I do not.

Q. Where in the policy does it say that a policy can be transferred from one member of the family to another member of the family, providing they reside in the same household?

A. It does not say so in the policy. That is in

(Testimony of J. M. Smith.)

the Manual that is filed with the State Insurance Department.

Q. That Manual is not given to the policy-holder, though? A. No.

Q. That is a company rule, then?

A. That is right.

Q. So, all this testimony as to what must be done and what should be done has to do with company rules?

A. Well, however, they are filed. All the Insurance Department requirements that we follow are in that Manual.

Q. Is it your testimony that in that Manual which you file with the Insurance Commission of the State of Oregon it says that a policy may be transferred from one member of the family to another member of the family who resides in the same household? A. Yes. •

Q. It says that definitely? A. Yes, sir.

Q. And it says that it cannot be transferred to a member of the family who resides elsewhere? [132]

A. I don't know whether it says it cannot. Generally it says that the only conditions under which a policy may be transferred from one member of one family to another is for them to be residing in the same household.

Q. In order to effect such a transfer, what is necessary?

A. The taking of this application from the person who is applying to have the insurance transferred to them.

(Testimony of J. M. Smith.)

Q. That application is the application you use for writing a new policy, too, is it not?

A. That is right.

Q. In other words, that is the same application that anybody would use in attempting to sell insurance; you have them fill out that application.

A. Yes.

Q. Regardless of where they live?

A. Oh, yes.

The Court: Who passes on the application?

A. The underwriter in the Portland office.

The Court: What is an underwriter?

A. An underwriter is a person designated to determine whether or not the risk is acceptable to the company.

The Court: You mean an agent at The Dalles cannot take an application for insurance direct?

A. Yes, he will take it direct, and the application will be reviewed by the underwriter in the Portland office, and its [133] acceptability will be determined by the underwriter in Portland.

The Court: Where does this policy come from?

A. The policy is issued in the Portland office.

The Court: The man is insured from the time the agent takes the check?

A. Yes, he is insured from the time he takes the application and check until such time as he is canceled or rejected, let's say.

Mr. Prendergast: Has the Court finished.

The Court: I am finished for the moment.

Q. (By Mr. Prendergast): Mr. Smith, this pol-

(Testimony of J. M. Smith.)

icy provides that anybody operating an automobile with the permission of the insured is covered by insurance, does it not?

A. Anyone may drive a policy-holder's car and be covered if they are driving that car with the policy-holder's permission.

The Court: In connection with these family transfers, made in the same household, what do they usually do? Hand the policy over to the other?

A. No, sir, it is a matter of taking a signed application.

The Court: That is no different than any other transfer?

A. I don't believe I quite understand the question, sir.

Q. (By Mr. Prendergast): Let's pursue that a bit further. Say a father wants to transfer a car to his daughter who is residing at home. Do you take a new application the same as you would from a new insured? [134]

A. Yes.

Q. And make your investigation, if they are still holding the policy?

A. Yes.

Q. What do you do? Take the policy back from the father?

A. Take the policy.

Q. Yes, and a new policy is issued?

A. A new policy is issued.

Q. A new policy is issued?

A. Yes. If the daughter or the son, or whoever they want the policy transferred to, after taking this application, if they are acceptable a new policy is

(Testimony of J. M. Smith.)

issued to the new policy-holder. The same policy is not transferred.

Q. There isn't any such thing as transferring of the policy, then? It is a new policy?

A. Let me say this: I think it will clear it up: There is no transfer of the policy. There is a transfer of the membership fees in connection with the policy.

Q. What do you mean?

A. The membership fees represent the sales or acquisition cost.

Q. Do you mean they get some credit for the premium that is prepaid?

A. Let us say that the father buys a policy. This application is taken. The membership fee is charged for each coverage purchased, as, for example, bodily injury and property damage, a [135] very popular coverage, for which a \$5.00 membership fee is charged for that coverage. That is the sales and acquisition cost. That remains to the credit of the policy-holder, entitling him to insurance the rest of his life.

If he wants to transfer that membership fee—I think that is the better term, transfer the membership fee rather than the policy—to a member of his family residing in his household, then this application is taken.

Q. What happens to that membership fee? Does he get it back? A. No.

Q. In other words, it is just an extra \$5.00 that the company gets, is that it?

(Testimony of J. M. Smith.)

A. No. It is the commission that goes to the agent; it is sales and acquisition cost involved in every insurance policy.

The Court: Don't go into all of that or we will be here another week.

Mr. Prendergast: All right, your Honor.

Q. In regard to the County Judge down in Lincoln County, Judge Gilkey, his primary business is being County Judge, is it not?

A. Well, I don't know whether I am qualified to say what his primary business is. He is the County Judge and he sells—he is the County Judge as well as District Agent there.

Q. The office that Judge Gilkey occupies, is that office maintained and the rent paid by the Farmers Insurance Exchange?

A. No. That is paid by Judge Gilkey. [136]

Q. In other words, it is paid by Lincoln County, and he just writes some insurance on the side?

A. No. He owns his own building and maintains an insurance office in it.

Q. In this particular office is a courtroom occupied by Judge Gilkey?

A. The courtroom belongs to the County, yes.

Q. Is there any sign on there that says, "This is the office of the Farmers Insurance Exchange" or the "Farmers Group"?

A. Yes, there is a Neon sign that says "Farmers."

Q. Outside on the building? A. Yes.

Q. Is Judge Gilkey on a salary?

(Testimony of J. M. Smith.)

A. With Farmers?

Q. Yes. A. No, he works on a commission.

Q. That office is over at Newport?

A. Over at Newport.

Q. Toledo is the County Seat of the County, is it not? A. I believe so.

Q. You maintain no office in Toledo?

A. We might have a local agent's office there, or a local agent. There is no office, though.

Q. Who is the local agent?

A. I couldn't tell you, sir. [137]

Q. The Farmers Group write extensive insurance in this state? A. Yes.

Q. How many policy-holders do you have, approximately?

Mr. Young: That is objected to.

The Court: Sustained.

Q. (By Mr. Prendergast): You are on a salary with Farmers, are you not? A. Yes.

Q. What is your salary? A. \$950 a month.

Q. You have been with them twenty years?

A. Yes, sir.

Q. Do you receive any override on commissions?

A. No, sir.

Q. That is your entire remuneration from the company, nine hundred and some-odd dollars per month? A. Yes, sir.

Mr. Prendergast: That is all.

(Testimony of J. M. Smith.)

Redirect Examination

By Mr. Young:

Q. You said that there was no provision in the policy with respect to transfers. Are you familiar with Condition 18 which reads in part:

“No assignment of interest under this policy [138] shall bind the Exchange until its consent is endorsed hereon”?

A. Yes.

Q. There is that provision in the policy?

A. Yes.

Q. But that is the only one, I believe?

A. That is right.

Q. You mentioned on cross-examination the existence of a document called a “Manual” which the Exchange files with the Insurance Commissioner at Salem.

A. Yes.

Q. Do your various District Agents throughout the state have copies of those Manuals?

A. Yes.

Q. Are they subject to the regulations and rules set forth in those Manuals?

A. Yes.

Q. Does any one of the District Agents in the State of Oregon have any authority to waive or alter any provisions of those Manuals?

A. No, sir.

Q. And that would include Mr. Lawrence at The Dalles, would it?

A. Yes.

Q. Are those Manuals public records?

(Testimony of J. M. Smith.)

A. Yes, they are on file with the Insurance Department. [139]

Mr. Young: That is all.

(Witness excused.)

Mr. Young: At this time, your Honor, I wish to offer in evidence Defendant's Exhibit No. 23.

Mr. Prendergast: No objection.

The Court: Admitted.

(Form of Agent's Report, Farmers Insurance Exchange, heretofore marked for identification, was thereupon received in evidence as Defendant's Exhibit No. 23.)

Mr. Gearin: At this time, your Honor, I would like to introduce the Exhibit 21, the Certificate of the Secretary of State regarding the transfer of this automobile; Exhibit No. 18 the letter of Attorney Weinstein to the Sondenaas, under date of November 16, 1948; Exhibit No. 24, the copy of proceedings in the Multnomah Circuit Court case.

The Court: Admitted.

(Certified copy of Certificate of Title issued to A. von Borstel, covering Plymouth sedan, and copy of Assignment of Title by registered and legal owners, heretofore marked for identification, was thereupon received in evidence as Defendant's Exhibit No. 21.)

(Letter dated November 16, 1948, Nathan Weinstein, [140] Attorney-at-Law, to Elmer

and Helen L. Sondenaa, heretofore marked for identification, was thereupon received in evidence as Defendant's Exhibit No. 18.)

(Certified copy of pleadings in case of Louise Holm, plaintiff, vs. Elmer N. Sondenaa and Helen L. Sondenaa, husband and wife, and A. von Borstel, No. 185-807, Circuit Court of the State of Oregon for Multnomah County, heretofore marked for identification, was thereupon received in evidence as Defendant's Exhibit No. 24.)

Mr. Gearin: That is all.

The Court: Any rebuttal?

Mr. Prendergast: No, rebuttal, your Honor. I want to check the exhibits, if I may.

Mr. Young: At this time, your Honor, there is a legal matter which I would like to present to the Court.

The Court: Wait until we finish with this.

Mr. Prendergast: That is all for the moment, your Honor.

The Court: What do you mean, "for the moment"? Are you through?

Mr. Prendergast: We are through, save and except for the matter we discussed relative to attorneys' fees. We have some legal matters to take up.

I believe I am correct in stating that it has been agreed by counsel that, if plaintiff should prevail and be entitled to attorneys' fees, the amount of attorneys' fees can be settled and determined by the Court.

Mr. Gearin: That is satisfactory, your Honor.
The Court: You are through?

Mr. Prendergast: Through with the evidence, yes.

The Court: Take the jury over to Judge Fee's courtroom. Ladies and Gentlemen, will you go with Major Kneass to the other side for a while?

(The jury was thereupon excused from the courtroom.)

DEFENDANT'S MOTION FOR AN ORDER DIRECTING A VERDICT AGAINST PLAINTIFF

Mr. Young: At this time, your Honor, the defendant moves the Court for an order directing a verdict against the plaintiff and in favor of the defendant for the following reasons:

In the first place, under the "Insuring Agreements," Agreement I, Coverage A, the Exchange agrees "to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages * * * because of bodily injury * * *"

Under Insuring Agreement III, "The unqualified word 'insured' wherever used in Coverage A * * * includes not only the named insured but also any person while using the automobile and any person * * * legally responsible for the use thereof, provided that the declared and actual use of the automobile * * * is with the permission of the named insured."

It appears, without dispute, from the evidence that the insured, A. von Borstel, on June 29, 1948,

transferred his [142] Certificate of Title to the 1940 Plymouth to his daughter, Helen Sondenaa.

Accordingly, on October 3, 1948, when the accident occurred, von Borstel was not the owner of the car and, therefore, not the insured under the policy.

Moreover, having transferred title to the car to his daughter, von Borstel no longer had the capacity to permit his daughter or anyone else to use the car. Helen Sondenaa, therefore, was not an additional insured under the policy.

In the second place, as the owner of the 1940 Plymouth by transfer from her father, Helen Sondenaa acquired no rights under the policy.

Condition (17) titled "Changes" reads: "No notice to any agent or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the Exchange from asserting any rights under the terms of this policy * * *"

Condition (18) titled "Assignment" reads: "No assignment of interest under this policy shall bind the Exchange until its consent is endorsed hereon * * *"

Within the meaning of these two provisions of the policy, the transfer of title to Helen Sondenaa from von Borstel of the 1940 Plymouth automobile, not having been consented to by the Exchange, through endorsement on the policy, made the transfer of the policy to Helen ineffective. [143]

In the third place, your Honor, Title 101, Chapter 13, O.C.L.A., relating to reciprocal insurance, provides for a form of insurance through the exchange

of insurance contracts by members of the organization provided for in the Act. It also provides that insurance contracts may be executed for subscribers by an attorney duly authorized and acting for such subscribers. I refer in this regard to Section 103-1302, O.C.L.A.

Helen Sondenaa was not a member of the Insurance Exchange and, therefore, not eligible for insurance protection.

In the fourth place, your Honor, the insuring agreements and conditions of the policy provide, among other things, that the Exchange agrees with the insured, "named in the Declarations, made a part hereof, in consideration of the payment of the membership fee" and the execution of a power of attorney to the Farmers Underwriters Association, to protect the insured in a certain manner.

There is neither pleading nor proof that Helen Sondenaa ever paid such a membership fee or executed such a power of attorney. Therefore, by the terms of the policy she could not be entitled to insurance protection.

Fifth, your Honor, the policy of insurance involved herein is an executory contract, in connection with which the personal character of the insured is an important element and, therefore, as a matter of law, not assignable without the consent of the parties. Her purported assignment occurred before the accident [144] took place. The consent of the Exchange not having been obtained, the purported assignment was ineffectual. That this policy of insurance involves the personal character of the in-

sured appears definitely from Exhibit 23 which has just been introduced in evidence.

In the sixth place, the alleged statement by District Agent Lawrence of the Exchange, that the policy would have to be "signed by the daughter, but that since the premium was paid and the transaction remained in the family the policy would cover Helen Sondenaa," does not estop the Exchange from asserting non-liability under the policy.

To begin with, there has been no showing whatever in this case that the District Agent had any authority to make such statements, if in fact they were made, or to bind the Exchange by such statements.

Condition (17) of the policy expressly states that the terms of the policy may not be changed or varied "except by endorsement issued to form a part hereof, signed for Farmers Automobile Inter Insurance Exchange, by an executive officer of its attorney-in-fact, the Farmers Underwriters Association."

Moreover, as appears without contradiction from the testimony of Mr. Smith, the last witness on the stand, the Manual of the Exchange and the rules and regulations bind these agents, and these agents are not at liberty to alter or change the Manual or the rules and regulations in any regard. [145]

Moreover, your Honor, the purported statement, if it was made at all to von Borstel, was to the effect that the policy would have to be "signed" by the daughter, and that failure by the daughter to sign would render the policy ineffective.

Again, the transaction was not one remaining in

the family, in the sense of the family living under one roof, because the von Borstel and Sondenaa families were separate and distinct families, living at remotely located geographical points, the distance between them some 250 miles.

Furthermore, the representations made by Mr. Lawrence were made to von Borstel and not to Helen Sondenaa, and he is the only one who could complain in respect to any representations made, and he has not complained and is not complaining.

Again, there were no representations made in this case to the plaintiff, Louise K. Holm, and she at no time ever acted or relied upon any statement whatsoever made by Mr. Lawrence.

Still again, the provisions of the policy relating to assignment of interest and lack of power in general to change the terms were known to or should have been known to von Borstel, for he had the identical policy in his possession for ten years prior to the transfer of this automobile and, moreover, he knew from his experience in 1940, when he exchanged his earlier Plymouth automobile for the 1940 Plymouth automobile, that instructions to change the policy had definitely been given by him to [146] the Exchange.

In that regard, your Honor, I call your attention to the policy of insurance which is before the Court, and which contains a rider issued to Mr. von Borstel on the 11th day of May, 1942, by the Farmers, wherein it states in so many words that "In accordance with your instructions, coverage on your pol-

icy is transferred by this endorsement to cover the car described below instead of as heretofore.”

In addition, your Honor, von Borstel had all reasonable opportunity to learn the facts and obviously made no effort whatsoever to do so.

Finally, Helen and Elmer Sondenaa——

The Court: Where are you reading all that from?

Mr. Young: These are some memoranda I prepared. The subject is a little technical and I did not wish to rely on my memory.

The Court: You do not have all that on one page?

Mr. Young: No, your Honor. I have several pages here. Finally, Helen Sondenaa——

The Court: This is the longest motion for a directed verdict I ever heard.

Mr. Young: I always like to break the record, your Honor, if possible. This apparently may be one of those instances, although I thought perhaps by stating this matter in considerable detail your Honor would have before you, in succinct form, all the points we have in mind, to the end that the record will be complete, and [147] your Honor can have before you full opportunity to give consideration to these matters.

The last point I have in mind in this connection is that both Helen and Elmer Sondenaa failed to use reasonable diligence to acquire any knowledge of the facts.

Again, seventh, I call your Honor's attention to this, that retention of the premium by the Exchange

does not constitute any estoppel or waiver which would create any insurance rights in Helen Sondenaa for the reason that at the time the premium was received by the Exchange the evidence shows they did not know what the factual situation was with respect to the title to the car; this is a circumstance which, in any event, occurred after the loss took place, and Mrs. Sondenaa herself had the policy in her possession at this time.

Finally, at the time, or shortly after the time the premium was received the Insurance Exchange put all of the parties on notice that it regarded the situation as being one where there was no coverage, so that retention of the premium cannot here be considered, under any circumstances, as an admission that there was coverage, that circumstance being completely rebutted by letters sent out to the parties.

Finally, Mr. von Borstel has never made any request for the return of the premium.

If the Court please, those are our points.

(Argument of Counsel.) [148]

The Court: I am going to submit the case to the jury. I am going to reserve decision on the motion for a directed verdict until after the verdict of the jury.

I am inclined to think that there are two aspects to this matter of estoppel, one of express warranty, the other of acceptance and retention of the premium. There is no fact dispute about that latter, and I am inclined to think the company is in a bad

position as to that, as a matter of law, that it estops it from taking the position it does here. Since there is no fact in issue, I am not going to submit that to the jury. I am going to submit to the jury this factual dispute between the parties at the outset.

Mr. Gearin: I assume, your Honor, arguments will be limited, then, to the statements of Lawrence with regard to what was said to the change in the policy and that, in view of your Honor not submitting this other question to the jury, we will be precluded from arguing that to the jury.

The Court: I am telling you that all I am going to submit to the jury is the sole question of the conflict in the evidence as to what Lawrence said up there.

Mr. Gearin: Do you wish requested instructions submitted at this time?

The Court: I haven't any as yet.

(Recess.)

(Arguments of counsel for the respective parties [149] to the jury.)

COURT'S ORAL INSTRUCTIONS TO THE JURY

The Court: Ladies and Gentlemen, there are a number of questions in this case, but I am only going to submit one to you. I have explained that to the lawyers previously. They argued the case to you somewhat with that background.

The function of a jury, as I know you understand the rules, is to try disputed questions of fact.

Questions of law are for the decision of the Court, and there are some questions of law in this case, as you have observed.

It will be your function to decide the dispute as to what was said at The Dalles between Lawrence and von Borstel. There is a dispute between them that you will have to decide. Jurors very often have that very thing to do—to decide where the stories clash and cannot be reconciled. Bad memory or misunderstanding often enter into it. Sometimes one answers one way and the other answers the other way—answers the opposite—and both believe they are telling the truth.

In this case, regardless of what the attorneys have stated, that is the dispute which I am going to submit to you for decision.

This plaintiff, like every plaintiff, has the burden of proof, and must satisfy you by a preponderance of the evidence, that von Borstel's version of what happened there is the correct [150] one—must prove that to your satisfaction by a preponderance of the evidence, and greater weight of the evidence. If you are so satisfied, your verdict must be for the plaintiff. If you are not so satisfied, your verdict will be for the defendant.

Von Borstel says that he went to Lawrence, the District Agent for these companies at The Dalles, and told him he was giving a Plymouth car to a married daughter who lived in Toledo, and he wanted to know what was necessary to make sure that the insurance on it was good after he gave her the car. That is a rough way of putting it.

He says that Lawrence, the agent, told him that his daughter should go to the company's agent down there in that country where she lived, and that she should "sign the policy." I don't know what that means, and that is one of the things you will have to figure out.

He claims* having communicated that to his daughter. Actually, they claim they understood from that, because she was his daughter, the car was still in the family and the car would remain in the family and the insurance would be good and the insurance would protect her ownership, in accordance with the terms of the policy.

They claim they understood Lawrence to mean that, while she should go down to the agent, it was not an indispensable requirement, and that the insurance would be effective, so long as he turned the car over to her and the policy, as well. [151]

If you believe that story, by a preponderance of the evidence, and if you feel that the daughter and son-in-law acted on it, and, as a result, did not believe under the circumstances it was necessary to make a new application to the company and get the company's approval of the transfer from von Borstel, your verdict should be for the plaintiff.

If you do not believe that by a preponderance of the evidence, and that is if you don't believe von Borstel's version of it, then your verdict will be for the defendant.

That is the only question I submit to you. You are the exclusive judges of the credibility of the witnesses and of the weight and the value of their

testimony. You will take the exhibits with you to the jury room and will give them such weight as you feel they are entitled to.

Your verdict must be unanimous. Upon retiring to the jury room you will elect a foreman who will sign your verdict. Take the jury upstairs, Major.

Do not begin to deliberate on the case, Ladies and Gentlemen, until we send up the exhibits.

Swear the Bailiff.

(The Bailiff was then sworn.)

The Court: The Bailiff will bring the exhibits and two forms of verdict up to you very soon. Don't begin to deliberate on the case—that means discuss it—until after you get these exhibits and the forms of verdict.

(The jury thereupon retired to the jury room.) [152]

OBJECTIONS TO THE COURT'S INSTRUCTIONS

The Court: The plaintiff will state his objections for the record.

Mr. Prendergast: May we have just a moment, your Honor?

The Court: The defendant's attorneys will state your objections meanwhile.

DEFENDANT'S OBJECTIONS TO COURT'S INSTRUCTIONS

Mr. Young: At this time the defendant excepts——

The Court: Objects.

Mr. Young: ——object to your Honor's submission to the jury of the von Borstel version, in the particular that it was stated Mrs. Sondenaa, the daughter, would have to sign the policy. I think from the evidence in the case it would appear that the term meant was that they would have to sign an application.

The defendant also objects to the failure of the Court to give the Lawrence version of the same conversation, which version was that Lawrence told von Borstel if his daughter took the car and he retained possession of title the car would then be insured in his name and the daughter would be additionally insured; but, on the other hand, if title passed to the daughter, then the daughter would become a new applicant and would have to sign an application.

The Court: You have a motion for requested instructions. [153]

Mr. Young: The defendant also objects to the failure of the Court to grant each and all of the requested instructions submitted.

The Court: Objections noted, and the record may show that I have considered them all, and that each and all are overruled, with exception to the defendant.

PLAINTIFF'S OBJECTIONS TO COURT'S INSTRUCTIONS

Mr. Prendergast: The plaintiff objects to the instructions of the Court in stating to the jury the von Borstel theory and in failing to instruct the jury that von Borstel contended Lawrence, in addition to saying that the policy should be signed, stated in the meantime that the daughter would be covered so long as the premiums were paid.

Further, plaintiff objects to the Court's failure to instruct the jury with regard to the doctrine of estoppel as to the right of the insured to rely upon the ostensible authority and statements made by the agent at the time.

The Court: The objections of the plaintiff have been noted, have been considered, and each and all are overruled.

To make a better record in this case, the correct way would be this: For the plaintiff, you should move now for a directed verdict as a matter of law, on the ground that the acceptance and retention of the later premium in November constituted an estoppel against the defendant, as a matter of law. [154]

When you make that motion, I will reserve ruling on it and consider it at the same time I consider the other questions that I have reserved.

Mr. Prendergast: Is it possible for plaintiff's counsel to say, "I so move"? I didn't quite catch your Honor's statement. The gist of the motion is that the plaintiff moves for a directed verdict

upon the ground that the acceptance of the later premium——

The Court: ——and retention of it.

Mr. Prendergast: ——on the ground that the acceptance and retention of a later premium by the defendant constituted an estoppel to deny liability, as a matter of law.

The Court: Decision on the motion is reserved, along with the other questions that have been reserved in the case.

Now, send the exhibits and the forms of verdict up to the jury.

Mr. Young: In view of your Honor's suggestion to Counsel with reference to moving for a directed verdict and Counsel's concurrence in so doing, the defendant then objects to that procedure upon the ground that there should have been submitted to the jury, as a question of fact, whether or not the defendant had full knowledge of the circumstances surrounding the ownership of the car at the time that it accepted the premium.

The Court: The objection is overruled.

Mr. Gearin: Or, the other way around, we object to the [155] failure of the Court to submit that question to the jury.

The Court: Your co-Counsel just said that.

Mr. Gearin: I want to put it in another form.

The Court: Objection overruled.

(Recess.)

Mr. Young: Do I understand that whenever the

verdict comes in your Honor will rule on the various legal matters?

The Court: No.

Mr. Young: Your Honor merely will receive the verdict?

The Court: That is all. [156]

Monday, October 30, 1950—10:00 o’Clock A.M.

Mr. Prendergast: At this time counsel for the plaintiff and counsel for the defendant have appeared for the purpose of settling the form of judgment that is herewith tendered to the Court.

The form of judgment provides that the plaintiff have and recover of and from the defendant the sum of \$10,000, which is the agreed limit of the policy, save and except for additional sums which the plaintiff claims they are entitled to under the provisions of the policy.

Those fall into three categories, questions to be determined: First, plaintiff contends that they are entitled to the sum of \$10,000, together with interest on the sum of \$12,773.40, which is the amount of judgment rendered in the Circuit Court for the State of Oregon, for the County of Multnomah, in the case of Louise Holm vs. Elmer N. Sondenaar, et al., No. 185-807.

Plaintiff contends that the interest on the sum of \$12,773.40 is in keeping with the decision in New Jersey Fidelity & Plate Glass Insurance Company vs. Clark, reported in 33 Fed. (2) at Page 235, and comes under the terms of the insurance policy in Section II, subsection (B) which provides that the insurance company will “pay all premiums on [157]

bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the Exchange, all interest accruing after entry of judgment until the Exchange has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the Exchange's liability thereon, and any expense incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident. The Exchange agrees to pay the expenses incurred under Divisions (A) and (B) of this section in addition to the applicable limit of disability of this policy."

Under the decision cited, which seems to be exactly in point, it permit the charging of interest on the greater sum until all money has been paid into court or tendered by the insurance company, which is interest in this case on \$12,773.40.

The second point or question arises as to the payment of additional sums for medical and surgical expenses, under the provisions of the policy just cited, to wit, Section II(B) of the policy. The additional medical and surgical expenses are evidenced by the judgment entered in the Circuit Court, which is Exhibit 24, a certified copy of the record of *Holm vs. Sondenaa, et al.*, in the Circuit Court of the State of Oregon for the [158] County

of Multnomah. The question to settle is whether or not, as plaintiff contends, plaintiff in this case is entitled to this additional sum of \$708.45 in the judgment to be entered herein, or what part thereof plaintiff would be entitled to.

The third point to be determined at this time is the additional sum to be allowed to plaintiff as attorney's fees in the trial of this cause. I believe I am correct in stating that during the course of the trial it was agreed by counsel that if plaintiff should prevail and be entitled to attorneys' fees the amount of the attorneys' fees could be settled and determined by the Court. At the time of the trial it was agreed that such question had not been settled and should be settled, if plaintiff prevailed and was entitled to a judgment.

In passing, I merely call the Court's attention to the fact that plaintiff at the time was prepared to submit evidence of a reasonable attorneys' fee, and, upon agreement between counsel, dismissed such witnesses and no testimony was taken thereon.

The question of attorneys' fees, plaintiff submits, is provided by the Oregon Code Annotated, Section 101-134, and it is plaintiff's contention at this time it was merely a matter of the amount for the Court to determine.

Mr. Gearin: If the Court please, in connection with the form of judgment which has been submitted by the plaintiff, it is the position of the defendant that the judgment must only be [159] in the amount of \$10,000, the face value of the policy, together with the costs taxed in the lower court

in the cause entitled "Louise Holm vs. Sondenaa, et al.," Circuit Court No. 185-807, in the amount of \$64.95.

With regard to the claim for special damages in the amount of \$708.75, which amount was the amount of special damages awarded by the jury in the Circuit Court action entitled "Holm vs. Sondenaa, et al.," we submit the Exchange is not liable for that amount under Insuring Agreement I, Coverage A and Coverage B, and the amount which the Exchange is bound to pay, if at all, is \$10,000 plus costs in the lower court.

The provisions of Insuring Agreement II(B) are not applicable because it provides that the Exchange shall pay only "* * * any expense incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident."

It is our position the Court cannot award special damages in an amount in excess of the face value of the policy, for to do so would be to extend the coverage not contemplated by any insuring agreement in the policy. That refers only to immediate and imperative surgical relief at the time of the accident, and refers to such items as emergency first aid and other expenses incurred by the insured, and does not refer to items of special damages.

With regard to the interest, the limits of the policy [160] are set forth and II, subsection (B), refers to the applicable limits of liability on the policy.

With regard to the question of attorneys' fees, it is our understanding that it was, at the time of trial, agreed between counsel that the matter would be taken care of after the determination of the liability. We are in accord with plaintiff's attorneys that the Court may determine reasonable attorneys' fees to be allowed in this action, without benefit of any testimony whatsoever.

Furthermore, your Honor, we have examined the cost bill which has been prepared by plaintiff and upon which service was accepted this morning, and we will have no objection to the items of cost set forth in the cost bill. [161]

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, an Official Reporter of the above-entitled Court, duly appointed and qualified, do hereby certify that on June 16 and 17, 1950, and October 30, 1950, I reported in shorthand the proceedings in the above-entitled matter; that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisted of pages numbered 1 to 161, both inclusive, constitutes a full, true and accurate transcript of said proceedings so taken by me in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated this 22nd day of November, A.D. 1950.

/s/ IRA G. HOLCOMB,
Official Reporter.

[Endorsed]: Filed December 13, 1950.

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Petition for Removal and Complaint, Bond on Removal, Notice of Filing Petition and Bond, Order extending time to file Answer, Answer, Demand for Jury Trial, Verdict for Plaintiff, Opinion of Court, Order denying Motion for Judgment notwithstanding Verdict, Judgment for Plaintiff, Notice of Appeal, Supersedeas Bond on Appeal, Statement of Points, Designation of contents of Record, Order to transmit original Exhibits, and Transcript of Docket Entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5251, Louise K. Holm, Plaintiff and Appellee, and Farmers Insurance Exchange, also known as Farmers Automobile Inter Exchange, Defendant and Appellant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate transcript of proceedings dated June 16-17, and October 30, 1950, also instructions requested by defendant, also exhibits Nos. 3 to 28, inclusive.

I further certify that the cost of preparing the

within transcript and filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 20th day of December, 1950.

[Seal]

LOWELL MUNDORFF,

Clerk.

By /s/ L. BUCK,

Chief Deputy.

[Endorsed]: No. 12785. United States Court of Appeals for the Ninth Circuit. Farmers Insurance Exchange, also known as Farmers Automobile Inter Insurance Exchange, Appellant, vs. Louise K. Holm, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed December 22, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12785

FARMERS INSURANCE EXCHANGE, Also
Known as FARMERS AUTOMOBILE
INTER INSURANCE EXCHANGE,
Appellant,

vs.

LOUISE K. HOLM,

Respondent.

APPELLANT'S STATEMENT OF POINTS
TO BE RELIED UPON ON APPEAL

Farmers Insurance Exchange, appellant above named, intends upon its appeal to rely upon the following points:

I.

The court erred in admitting in evidence testimony of witness Elmer Sondenaa of what A. von Borstel told him that Agent Lawrence had told von Borstel (Tr. 55).

II.

The court erred in admitting in evidence testimony of the witness Elmer Sondenaa as to the statements of adjuster Patterson (Tr. 62).

III.

The court erred in admitting in evidence testimony of witness Helen Sondenaa of what A. von Borstel told her that Agent Lawrence had told von Borstel (Tr. 82).

IV.

The court erred in overruling defendant's motion for an order directing a verdict against plaintiff (Tr. 142-149, and the order of the court entered thereon).

V.

The court erred in failing to submit to the jury the factual question of whether or not defendant's acceptance and retention of a premium paid on or about November 8, 1948, was made with full knowledge of all the facts (Tr. 149, 154-156).

VI.

The court erred in giving to the jury as a part of its instructions an erroneous version of the testimony given at the trial as to what was said between Agent Lawrence and the assured, von Borstel (Tr. 150, 153).

VII.

The court erred in failing to submit to the jury defendant's version of this conversation in addition to the version given by plaintiff (Tr. 150, 153).

VIII.

The court erred in failing to give defendant's requested instructions hereinafter quoted, each of which was prefaced by the following request:

“To the Court: The Court will understand that each subdivision of any instruction hereinafter requested is to be deemed a separate and complete instruction.”

IX.

The court erred in failing to give defendant's requested instruction IV B:

"You are not to consider any controversy between the defendant Exchange and A. von Borstel."

X.

The court erred in failing to give defendant's requested instruction IV D:

"Before there can be an estoppel in this case against the defendant, the plaintiff must first prove by a preponderance of the satisfactory evidence all of the following, which constitute elements of estoppel.

(1) Agent Lawrence must have been authorized to make the statements which are claimed by the plaintiff.

(2) Agent Lawrence must have made a false representation or concealment of material facts.

(3) Agent Lawrence must have made the representation or statements with actual or constructive knowledge of the true facts.

(4) The party to whom the statements were made, that is, the assured A. von Borstel must have been without knowledge or means of knowing the true facts.

(5) Agent Lawrence must have made the statements with the intention that the state-

ments be relied upon and the party to whom the statements were made, that is, the assured A. von Borstel must have relied upon the statements of agent Lawrence to his prejudice."

XI.

The court erred in failing to give defendant's requested instruction V:

"If you find from the evidence in this case that no representation was made by the defendant to Helen L. Sondenaa, then an essential element of estoppel would be lacking and your verdict would have to be for the defendant."

XII.

The court erred in failing to give defendant's requested instruction VII:

"A. There can be no estoppel where the conduct of the person asserting the estoppel is the result of such person's faults or negligence.

"B. In other words, if the failure on the part of Helen L. Sondenaa to have the policy formally assigned to her was the result of her own fault or negligence rather than the statements made by agent Lawrence, then in that event you must find your verdict in favor of defendant."

XIII.

The court erred in failing to give defendant's requested instruction VIII.

“You are instructed that if under the circumstances of this case a reasonably prudent person would have made further inquiry as to the location and identity of an agent of the Exchange, and would have had the policy formally assigned within a reasonable period of time after the transfer of title, and you further find that Helen L. Sondenaa did not act as such reasonably prudent person would have acted, then in that event the plaintiff can not recover and your verdict would have to be in favor of the defendant.”

XIV.

The court erred in failing to give defendant's requested instruction IX:

“Before you can find that the Exchange was estopped to deny that the policy was transferred to Helen L. Sondenaa based upon the retention of the premium paid by A. von Borstel after the accident, there must appear from the satisfactory evidence that the Exchange knew of the transfer of title prior to the time the premiums were received.”

XV.

The court erred in failing to give defendant's requested instruction XI:

“A. The party setting up estoppel must have acted in reliance on the conduct or the representations of defendant. Helen L. Sondenaa must have had knowledge of the conduct

or representations and must not only have been destitute of knowledge of the validity of the assignment without the consent of the defendant endorsed upon the policy but must also have been without convenient or ready means of acquiring knowledge of the validity of the assignment without the company's consent endorsed upon the policy. (To the Court: See *American Bank v. Port Orford Cedar Products Co.*, 140 Ore. 138, 12 P. (2d) 1014).

“B. A party relying upon an estoppel must exercise reasonable diligence to acquire knowledge of the facts and if a party conducts himself with careless indifference to means of information reasonably at hand, the doctrine of estoppel can not be invoked.

“C. You are instructed in this connection that one of the provisions written on the face of the insurance policy required an endorsement of the consent of the defendant on the policy before the assignment of any interest under that policy would be valid.”

XVI.

The court erred in failing to give defendant's requested instruction XII:

“A. Under the terms of 7 O.C.L.A., Sections 101-1301 to 101-1316, inclusive, which sections regulate reciprocal insurance in the State of Oregon, there can be no contract of insurance until such time as the applicant for insurance has become a subscriber to the Exchange.

“B. You are instructed that under these circumstances Helen L. Sondenaa could not have become an insured of defendant Farmers Insurance Exchange until after she became a member of the defendant reciprocal exchange.

“C. Since Helen L. Sondenaa never became a member of the defendant’s Exchange, she was not the insured under this policy of insurance and defendant is therefore not liable for any judgment obtained against her husband.”

XVII.

The court erred in failing to give defendant’s requested instruction XIV:

“If you find that A. von Borstel misunderstood the statements of agent Lawrence, then in that event the plaintiff can not recover in this case.”

XVIII.

The court erred in overruling defendant’s motion for judgment non obstante verdicto. (See defendant’s motion and court’s order thereon, in record.)

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,
CLARENCE J. YOUNG,

/s/ WILLIAM D. CAMPBELL,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 9, 1950.

[Title of Court of Appeals and Cause.]

STIPULATION

The parties to this cause by their respective attorneys do agree and stipulate that the exhibits admitted in evidence at the trial of this cause may be considered upon this appeal in their original form, without necessity for printing the same.

/s/ NATHAN WEINSTEIN,
Of Attorneys for Respondent.

/s/ WILLIAM D. CAMPBELL,
Of Attorneys for Appellant.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WM. E. ORR,

/s/ WALTER L. POPE,
United States Circuit Judges.

[Endorsed]: Filed February 16, 1951.

No. 12785

In The
United States Court of Appeals
For the Ninth Circuit

FARMERS INSURANCE EXCHANGE, also known as
FARMERS AUTOMOBILE INTER INSURANCE
EXCHANGE, *Appellant (Defendant)*

vs.

LOUISE K. HOLM, *Respondent (Plaintiff)*

Appeal from the United States District Court
for the District of Oregon.

HONORABLE CLAUDE C. McCOLLOCH, Judge

Appellant's Brief

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
CLARENCE J. YOUNG
JOHN GORDON GEARIN
WILLIAM D. CAMPBELL

800 Pacific Building, Portland, Oregon
Attorneys for Appellant (Defendant)

W. J. PRENDERGAST, JR.,
LEO LEVENSON
NATHAN WEINSTEIN

Spalding Building, Portland, Oregon
Attorneys for Respondent (Plaintiff)

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No. 12785

In the
United States Court of Appeals
For the Ninth Circuit

FARMERS INSURANCE EXCHANGE, also known as FARMERS
AUTOMOBILE INTER INSURANCE EXCHANGE,
Appellant (Defendant)

vs.

LOUISE K. HOLM, *Respondent (Plaintiff)*

Appeal from the United States District Court
for the District of Oregon

HONORABLE CLAUDE C. McCOLLOCH, Judge

Appellant's Brief

JURISDICTION

This is an action on a policy of liability insurance commenced in the Circuit Court of the State of Oregon for the County of Multnomah by Louise K. Holm, a citizen and resident of Oregon, against Farmers Insurance Exchange, a reciprocal inter-insurance exchange created under the laws of the State of California, and a citizen and resident of that state (Complaint, Tr. p. 6). The amount in controversy, after excluding interest and

costs, is more than \$3,000.00 (Complaint, Tr. pp. 9 and 11). The action was removed to the United States District Court for the District of Oregon upon Defendant's petition (Tr. p. 3). The District Court had jurisdiction under 28 U.S.C.A. Sec. 1332 and 28 U.S.C.A. Sec. 1441.

Final judgment was entered in the District Court against Defendant for \$10,000 (the policy limits) and certain other sums appearing in Tr. p. 22. From that judgment an appeal was taken to this court (Notice of Appeal, Tr. p. 22) which has jurisdiction of the appeal under 28 U.S.C.A., Sec. 1291.

SUMMARY OF FACTS AND CONTENTIONS

Plaintiff was injured in an automobile accident by the negligence of one Elmer H. Sondenaa, a boilermaker living in Toledo, Oregon, against whom she recovered a judgment for \$12,773.40 and costs. The car operated by Elmer H. Sondenaa at the time of the accident was owned by and registered in the name of his wife, Helen Sondenaa, a co-defendant in the above action, against whom plaintiff was denied recovery. Helen Sondenaa had received the car some months previously as a gift from her father, Amandus von Borstel, a farmer living near Kent, Oregon. Von Borstel had been a member of and policyholder in Farmers Insurance Exchange for a number of

years. The insurance policy was in its essence one to assume any liability incurred by Mr. von Borstel through the operation of a particular vehicle while he owned the same. It did not purport to follow the vehicle through successive changes of ownership; and it was not, in fact, assignable. When a car was transferred to a person not a member of the Exchange, the new owner was required to apply for membership before receiving a new policy on the vehicle. This consequence followed not only from the contract but from Oregon law applicable to insurance exchanges and their members. Nonetheless, the District Court rendered judgment on this contract against the Exchange and in favor of the present appellee, judgment creditor of the husband of a successor owner.

The theory on which plaintiff's complaint was drawn is stated in Paragraph XI thereof (Tr. p. 11) to be one of estoppel. The facts relied on to establish an estoppel, as proved at the time of trial, relate to three circumstances. As to the first—some time in June, 1948, von Borstel called upon Mr. William Lawrence, local agent of the Exchange in The Dalles, Oregon, and stated he intended to give his old car to his daughter as soon as he got a new one, and asked Lawrence what had to be done to transfer the policy. According to von Borstel's testimony (Tr. p. 63), the evidence most favorable to

appellee, Lawrence stated that "the policy would have to be signed by my daughter," either with him or their nearest representative at Toledo. When asked about coverage in the meantime, Lawrence further said, according to von Borstel, that "being a transaction within the family, as long as the premiums were paid on this policy, the policy would cover," (Tr. p. 63). The information thus received by von Borstel he transmitted to Mrs. Sondenaa, (Tr. p. 65) and to her husband, Elmer (Tr. pp. 88, 89). It is plaintiff's contention that these facts raise an estoppel against the Exchange to deny that the policy protected the Sondenaas. It is defendant's contention that Lawrence lacked authority to bind the Exchange by any such representations; that no estoppel can arise as between plaintiff's judgment debtor and the Exchange out of this transaction because the representations were not made to plaintiff's judgment debtor; that Helen Sondenaa, because of her marriage and residence at Toledo, Oregon, was not a "member" of the von Borstel family at Kent, Oregon, and that in any case the representations as understood by von Borstel were that the coverage would apply only to the brief period reasonably necessary for his daughter to sign the necessary papers on return to Toledo.

The second circumstance upon which plaintiff seeks to found an estoppel concerns various reports and in-

vestigations of the accident in relation to the time von Borstel paid the next premium. The accident happened on Sunday, October 3, 1948 (Tr. p. 101). It was first reported to the Exchange on October 16, 1948 (Tr. p. 133) in a letter from Elmer Sondenaa stating there was an accident involving Elmer H. Sondenaa as insured under policy 2098402 (Tr. p. 134). On investigation, the only Sondenaa of which the Exchange had any record as a policyholder, one E. G. Sondenaa of Toledo, was found to have dropped or cancelled his policy prior to 1945. Policy No. 2098402 was examined and found to cover a member named von Borstel residing some 250 miles from Toledo, in Kent (Tr. p. 135). The description of the car contained in Elmer H. Sondenaa's report did not agree in any particular with the car described in policy 2098402 (Tr. p. 102; compare Tr. pp. 57, 60). Under the circumstances, the Exchange paid no further attention to this report for the time being. Meanwhile, the regular semi-annual notice of premium due had been sent to von Borstel, who paid it on November 5, 1948 (Tr. p. 66). The Exchange deposited it on November 8 (Tr. p. 66). At a later date, information was given the Exchange which identified the policy on which claim was made as von Borstel's rather than that of E. G. Sondenaa.

It is plaintiff's contention that the Exchange's ac-

ceptance of this check, with knowledge of the facts of the accident, estopped the Exchange to deny coverage. It is defendant's contention that the sequence of dates clearly shows the Exchange was not aware of the facts of the accident at the time the premium check was accepted and that therefore no estoppel could arise.

The third circumstance relates to plaintiff's Exhibit 28, an official Oregon statement of financial responsibility referred to as Form SR-21. On that form the Exchange states that von Borstel was the registered owner and Elmer H. Sondenaa the operator of the car involved in the accident. The first of these statements was incorrect. It was incorrect because in Exhibit 14, dated November 13, von Borstel himself had informed the Exchange in writing that he was the registered owner, and this despite the fact that he had on July 25, 1948, endorsed over to his daughter the certificate of title to the car, (Tr. pp. 64, 89; Ex. No. 21). His action had been confirmed by the Secretary of State, who had issued the new title to Helen Sondenaa as owner on July 29, 1948 (Ex. No. 21). It is the plaintiff's contention that the filing of this form bearing statements indicating that the Exchange considered Elmer H. Sondenaa an additional insured under their contract with von Borstel operates to estop the Exchange from asserting the fact that there was no such coverage. It is defendant's contention that

this form was furnished upon the basis of false information given to the Exchange by their member and policyholder of record, Mr. von Borstel, just before the form was filed on November 17, 1948 (Tr. p. 86). No estoppel can be founded on acts induced by misrepresentations on the part of those claiming estoppel.

A further theory not embraced in the pleadings was suggested by the trial court (Tr. pp. 40, 176). This is to the effect that defendant's acceptance and retention of the November 5, 1948, premium payment constituted both an estoppel and a ratification of the prior representations. Plaintiff's position as to the effect of its acceptance has been noted above. With respect to retention of the premium payment by the Exchange, it is plaintiff's position that the Exchange thereby ratified all matters that eventually came to light. It is defendant's position that retention of a premium not initially received with knowledge of the facts has no such legal effect as the plaintiff contends; and that if it could have such an effect, one of the prerequisites to the establishment of plaintiff's contention would be a showing of demand for return of the premium. No such demand has at any time been made upon the Exchange.

The contentions here stated are presented on this appeal in several forms, viz., exceptions taken to the admission of evidence (Specifications of Error 1, 2 and

3), to the matters submitted by the trial court to the jury (Specifications of Error 4, 5, and 6), to the trial court's action in denying appellant's motion for a directed verdict and for judgment non obstante verdicto (Specifications of Error 7 and 8), and to the trial court's failure to give certain instructions requested by defendant below (Specifications of Error Nos. 9 through 17).

SPECIFICATIONS OF ERROR

A. Defendant specifies the following errors in the admission of evidence by the Court:

1.

The trial court erred in allowing Elmer Sondenaa to testify to what von Borstel said concerning what insurance salesman Lawrence had told von Borstel. The objection, ruling and matter erroneously admitted appear in the following passage, which is quoted from pages 88 and 89 of the transcript:

"A. My father-in-law told my wife and myself that he had been to see Mr. Lawrence in The Dalles about the transfer of the insurance policy for the coverage on the car, so it would also be transferred with the ownership, and Mr. Lawrence had told—

Mr. Gearin: That is objected to. We object to this witness testifying to what Mr. von Borstel said to Mr. Lawrence.

The Court: Overruled. Go on. Tell your story.

A. Mr. Lawrence had told Mr. von Borstel that we would be covered since it was already in the family."

2.

The trial court erred in allowing the Sondenaas to testify to statements made to them by an investigator named Patterson. The objection, ruling and matter admitted set forth here are quoted from Elmer Sondenaa's testimony at pages 94 and 95 of the transcript and from Mrs. Sondenaa's testimony on page 115:

PP. 94-95:

"Q. Did Mr. Patterson have any further conversation with you in relation to defending you or protecting you on those claims?

Mr. Gearin: Objected to, your Honor, on the ground and for the reason that any statement made by Mr. Patterson after the accident could not possibly form a basis for estoppel, with regard to the transfer of the policy, and upon the further ground that it has not been shown that this man, Patterson, an adjuster, had any authority to make any admission which might be binding on the Exchange.

The Court: Answer.

Q. (By Mr. Pendergast): You may answer the question.

Mr. Gearin: May I make this objection general as to all statements and all testimony in regard to the statements of Patterson?

The Court: It is so understood.

A. Will you read the question, please?
(Question read).

A. Yes, he did. I objected to giving Mr. Patterson the correspondence I had received from those attorneys, and he said, inasmuch as the Farmers Insurance Exchange was representing me in the accident, it was my duty, as the insured, to turn over all correspondence to him." * * *

P. 115:

"Q. Did you give Mr. Patterson all the information he requested?

A. Yes * * *.

Q. He told you the Farmers Insurance Exchange was representing you in the accident?

A. He did."

3.

The trial court erred in allowing Helen Sondenaa to testify as to what her father, Mr. von Borstel, told her that Lawrence had told him. The objection, ruling and matter erroneously admitted are here quoted from pages 111 and 112 of the transcript:

“A. He told me he had seen Mr. Lawrence in The Dalles and Mr. Lawrence said—

The Court: Wait a minute.

Mr. Gearin: I will object to what Mr. Lawrence said, your honor, and object to this line of testimony. What Mr. von Borstel told this witness that Mr. Lawrence had said is hearsay.

The Court: Objection overruled. What did he tell you? Go ahead.

A. My father told me that Mr. Lawrence said I should have my signature affixed to the policy in the area in which I was living, but there was no rush for it because I was a member of the family and the policy was good.”

B. The Court made the following errors in submitting the case to the jury:

4.

The trial court erred in failing to submit to the jury the question as to whether defendant accepted and retained a premium paid on or about November 8, 1948, with full knowledge of all the facts. The Court made the following statements in its charge, and the charge is in accordance with the statements here quoted:

“Ladies and Gentlemen, there are a number of questions in this case, but I am only going to submit one to you. * * * ” (Tr. p. 171)

“It will be your function to decide the dispute as to

what was said at The Dalles between Lawrence and von Borstel. * * *” (Tr. p. 172)

“That is the only question I submit to you.” (Tr. p. 173)

Objection was taken on page 177 in the following language:

“Mr. Young: In view of your Honor’s suggestion to Counsel with reference to moving for a directed verdict and counsel’s concurrence in so doing, the defendant then objects to that procedure upon the ground that there should have been submitted to the jury, as a question of fact, whether or not the defendant had full knowledge of the circumstances surrounding the ownership of the car at the time that it accepted the premium.

The Court: The objection is overruled.

Mr. Gearin: Or, the other way around, we object to the failure of the Court to submit that question to the jury.

The Court: Your co-Counsel just said that.

Mr. Gearin: I want to put it in another form.

The Court: Objection overruled.”

5.

The Court erred in failing to submit to the jury defendant’s version of a conversation between Mr. Lawrence and Mr. von Borstel, in addition to a version

based on plaintiff's evidence. The Court's version both in content and upon its face appears to have been taken from plaintiff's evidence alone. The Court said to the jury:

"Von Borstel says that he went to Lawrence, the District Agent for these companies at The Dalles, and told him he was giving a Plymouth car to a married daughter who lived in Toledo, and he wanted to know what was necessary to make sure that the insurance on it was good after he gave her the car. That is a rough way of putting it.

"He says that Lawrence, the agent, told him that his daughter should go to the company's agent down there in that country where she lived, and that she should 'sign the policy.' I don't know what that means, and that is one of the things you will have to figure out." (Tr. pp. 172, 173) * * *

"If you do not believe that by a preponderance of the evidence, and that is if you don't believe von Borstel's version of it, then your verdict will be for the defendant." (Tr. p. 173)

Objection was taken (Tr. p. 175) to this omission in the following language, based on Lawrence's testimony (Tr. p. 121):

"The defendant also objects to the failure of the Court to give the Lawrence version of the same conversation, which version was that Lawrence told von Borstel if his daughter took the car and he retained possession of title the car would then be insured in his name and the daughter would be additionally

insured; but, on the other hand, if title passed to the daughter, then the daughter would become a new applicant and would have to sign an application."

6.

The Court erred in submitting to the jury a version of the conversation between von Borstel and Lawrence which was not correct when measured by all the evidence, or even when measured by plaintiff's evidence alone. The version submitted was contained in the first two paragraphs quoted in specification of error No. 5 above, and will not be reiterated here. (See Tr. pp. 172, 173; compare Tr. pp. 63, 65.)

Objection was taken to this error in the following words:

"Mr. Young: At this time the defendant excepts—
The Court: Objects.

Mr. Young:—objects to your Honor's submission to the jury of the von Borstel version, in the particular that it was stated Mrs. Sondenaa, the daughter, would have to sign the policy. I think from the evidence in the case it would appear that the term meant was that they would have to sign an application." (Tr. p. 175)

C. The Court erred in ruling adversely upon defendant's motion for a directed verdict and for judgment notwithstanding verdict.

The Court erred in denying plaintiff's motion for directed verdict. The grounds urged in support of this motion appear in the record at pages 164 through 170. In summary, these contentions were that Helen Sondenaar, the owner of the car, at all times from and after July 25, 1948, was not covered by the policy, both because of the terms of the insurance contract, which was one with Mr. von Borstel personally, and because of statutory provisions of Oregon law; that no attempted assignment was made nor was the consent of the Exchange procured to any such attempt, either by the means provided for in the policy, i.e., by endorsement, or in any other way; that assuming the Exchange could be bound by estoppel, essential elements of estoppel were not made out by the evidence and did not in fact exist; and even had they existed, they do not avail the Sondenaas, through whom the plaintiff claims, because the Sondenaas failed to use due or reasonable diligence or, indeed, any diligence at all to carry out the instructions which plaintiff contends were given to Mr. von Borstel. The full text of the grounds urged is set forth in Appendix A attached to this brief. For the Court's denial of the motion see Tr. p. 21.

8.

The Court erred in denying defendant's motion for judgment notwithstanding verdict. The grounds urged for this motion were the same as those urged in the motion for directed verdict. For a full statement of them see Appendix A hereto. The Court denied the motion in a separate order (Tr. pp. 19, 20).

D. The Court erred in failing to give any of the instructions hereafter set forth which were requested by defendant. Objections were taken to such failure. The instructions as given by the Court were found in Tr. pp. 171-174 and Appendix B hereto.

9.

The Court erred in failing to give the following instruction requested by defendant:

"You are not to consider any controversy between the defendant Exchange and A. von Borstel."

10.

The Court erred in failing to give the following instruction requested by defendant:

"Before there can be an estoppel in this case against the defendant, the plaintiff must first prove by a preponderance of the satisfactory evidence all of the following, which constitute elements of estoppel:

“(1) Agent Lawrence must have been authorized to make the statements which are claimed by the plaintiff.

(2) Agent Lawrence must have made a false representation or concealment of material facts.

(3) Agent Lawrence must have made the representation or statements with actual or constructive knowledge of the true facts.

(4) The party to whom the statements were made, that is, the assured A. von Borstel must have been without knowledge or means of knowing the true facts.

(5) Agent Lawrence must have made the statements with the intention that the statements be relied upon and the party to whom the statements were made, that is the assured. A. von Borstel must have relied upon the statements of Agent Lawrence to his prejudice.”

11.

The Court erred in failing to give the following instruction requested by defendant:

“If you find from the evidence in this case that no representation was made by the defendant to Helen L. Sondenaa, then an essential element of estoppel would be lacking and your verdict would have to be for the defendant.”

12.

The Court erred in failing to give the following instruction requested by defendant:

“A. There can be no estoppel where the conduct of the person asserting the estoppel is the result of such person’s fault or negligence.

“B. In other words, if the failure on the part of Helen L. Sondenaar to have the policy formally assigned to her was the result of her own fault or negligence rather than the statements made by Agent Lawrence, then in that event you must find your verdict in favor of defendant.”

13.

The Court erred in failing to give the following instruction requested by defendant:

“You are instructed that if under the circumstances of this case a reasonably prudent person would have made further inquiry as to the location and identity of an agent of the Exchange, and would have had the policy formally assigned within a reasonable period of time after the transfer of title, and you further find that Helen L. Sondenaar did not act as such reasonably prudent person would have acted, then in that event the plaintiff can not recover and your verdict would have to be in favor of the defendant.”

14.

The Court erred in failing to give the following instruction requested by defendant:

“Before you can find that the Exchange was

estopped to deny that the policy was transferred to Helen L. Sondenaa based upon the retention of the premium paid by A. Von Borstel after the accident, there must appear from the satisfactory evidence that the Exchange knew of the transfer of title prior to the time the premiums were received.”

15.

The Court erred in failing to give the following instruction requested by defendant:

“A The party setting up estoppel must have acted in reliance on the conduct or the representations of defendant. Helen L. Sondenaa must have had knowledge of the conduct or representations and must not only have been destitute of knowledge of the validity of the assignment without the consent of the defendant endorsed upon the policy but must also have been without convenient or ready means of acquiring knowledge of the validity of the assignment without the company’s consent endorsed upon the policy. (To the Court: See *American Bank v. Port Orford Cedar Products Co.*, 140 Ore. 138, 12 P. (2d) 1014.)

“B. A party relying upon an estoppel must exercise reasonable diligence to acquire knowledge of the facts and if a party conducts himself with careless indifference to means of information reasonably at hand, the doctrine of estoppel can not be invoked.

“C. You are instructed in this connection that one of the provisions written on the face of the insurance policy required an endorsement of the consent of the defendant on the policy before the assignment of any interest under that policy would be valid.”

The Court erred in failing to give the following instruction requested by defendant:

“A. Under the terms of 7 O.C.L.A., Sections 101-1301 to 101-1316, inclusive, which sections regulate reciprocal insurance in the State of Oregon, there can be no contract of insurance until such time as the applicant for insurance has become a subscriber to the Exchange.

“B. You are instructed that under these circumstances Helen L. Sondenaa could not have become an insured of defendant Farmers Insurance Exchange until after she became a member of the defendant reciprocal exchange.

“C. Since Helen L. Sondenaa never became a member of the defendant's Exchange, she was not the insured under this policy of insurance and defendant is therefore not liable for any judgment obtained against her husband.”

The Court erred in failing to give the following instruction requested by defendant:

“If you find that A. von Borstel misunderstood the statements of Agent Lawrence, then in that event the plaintiff can not recover in this case.”

SUMMARY OF ARGUMENT

I.

A. The trial court committed prejudicial error in admitting certain hearsay testimony.

B. The trial court committed prejudicial error in giving the jury a one-sided summary of the evidence in its charge.

II.

A. The Sondenaas were not covered under von Borstel's policy. Plaintiff therefore claims coverage upon the theory of estoppel.

B. As a matter of law, plaintiff failed to make out an estoppel arising out of the conversation between von Borstel and Lawrence.

C. In addition to the fact that as to this conversation the plaintiff has not made out the elements of estoppel, there is a further objection that as a matter of law William Lawrence, district agent for Farmers Insurance Exchange who made the representations relied upon by plaintiff, had no authority to extend the coverage of the policy, and no act of the Exchange invested him with apparent authority for that purpose.

D. Plaintiff similarly failed to make out an estoppel

arising out of defendant's receipt of von Borstel's premium check dated November 5, 1948.

E. Plaintiff failed to make out an estoppel with respect to the Form SR-21.

F. Defendant's retention of the November premium, no demand having been made for its return, failed to meet the requirements of estoppel.

III.

Since plaintiff failed to make out the elements constituting estoppel as to any of the acts or representations of the defendant, or its agents, on which he relied in his pleadings, or the court relied in its memorandum opinion, as a matter of law plaintiff's case fails. In this state of facts, a Federal Court is required to direct a verdict for the defendant or take other appropriate procedural means to withdraw the entire case from the jury. The trial court here erred in failing so to do.

ARGUMENT

I.

Certain serious errors were committed affecting that phase of the case which was submitted to the jury.

A. The trial court erred, to the prejudice of the de-

fendant, in admitting testimony of Elmer and Helen Sondenaa as to what von Borstel told them Lawrence had said to him.

Von Borstel had already testified to this conversation himself (Tr. pp. 63, 65). Testimony of the Sondenaa's as to the substance of that conversation, at which they were concededly not present, is plainly hearsay.

Moreover, this was not merely cumulative testimony, for both Elmer's and Mrs. Sondenaa's versions were stronger against defendant than was von Borstel's version. Compare his testimony at pp. 63 and 65 of the transcript with that of Elmer at page 89 and Mrs. Sondenaa at page 112. In both of these passages an absolute assurance of coverage is attributed to Lawrence; whereas in von Borstel's words, there are important qualifications expressed.

B. The preceding errors were rendered more serious by the trial court's error in giving a one-sided commentary on the evidence relating to this conversation—an error which, it is submitted, requires reversal.

Sperber v. Conn. Mutual Life Ins. Co., C.A. 8, 1944,
140 F. (2d) 2, cert. den. 321 U. S. 798, 88 L. Ed.
1087, 64 S. Ct. 939;

McGlothan v. Penn. R. Co., C.A. 3, 1948, 170 F. (2d)
121, 125;

Virginian Ry. Co. v. Armentrout, C.A. 4, 1948, 166 F. (2d) 400, 4 A.L.R. (2) 1064; and

cf. *Lever Bros. Co. v. Atlas Assur. Co.*, C.A. 7, 1942, 131 F. (2d) 770, 778.

The Court's language appears on pages 172 and 173 of the transcript, and in Appendix B hereto. An inspection will reveal that the version charged omits two conditions on the continuation of protection by the policy which were still clear in von Borstel's mind at the time of trial. These are the necessity—not merely the desirability—of seeing an agent in order to get the policy signed, and the need for doing so promptly which is indicated in his phrase “at her first convenience” on page 65. Lawrence's version is not given; nor is the jury even reminded that he, too, had testified as to that conversation.

This is not that fair and balanced comment on the evidence which within the rule of the *Sperber* case, *supra*, is permitted a federal judge.

In the *Sperber* case, the plaintiff brought actions (consolidated for trial) on the disability clauses of policies with two companies, asserting that amputation of one arm had totally disabled him from following his occupation as hairdresser. Both applications were in evidence. In charging the jury, the court read aloud state-

ments from one in which Sperber had described himself as “proprietor of Sperber’s Hair Shop” with duties which were “executive and a small amount of cosmetology,” but declined, even after request, to read the other, in which the corresponding entries were “hairdresser” and “owner and operator hairdressing shop.”

The 8th Circuit sent the case back for a new trial, saying:

“The problem here is not that of a judge commenting upon or stating an opinion about the evidence. The situation is that the Court in summarizing an important aspect of the evidence—statements by appellant in these and other applications for insurance—outlined the evidence favoring appellees and, when requested to cover the same aspect where favorable to appellant, omitted to do so. * * *

“We think this part of this charge was thus prejudicial.”

This language was quoted with approval and the case followed by the Third Circuit in *McGlotham^r v. Penn. RR.*, supra. The *Armentrout* case is in accord. The *Lever Bros.* case is cited for contrast as an illustration of the general principle which the court there states. “The court should not take sides in its comment upon the evidence; and the court most certainly did not in the case at bar.”

In the light of the *Sperber* case, the court's one-sided summary in its charge is reversible error—particularly so when reinforced, as it was, by prejudicial error in the admission of testimony.

II.

A. The remaining issues in the case were decided by the court. They depend upon the legal effect to be given to various actions and communications between the Sondenaas and von Borstel, on the one hand, and the Exchange and its various agents on the other. At the outset it is to be noted that by the plain terms of the policy its coverage was limited to liability arising from the ownership, maintenance or use of the car described therein and did not extend beyond the period of its ownership by the named insured, von Borstel.

“Coverage A—To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile.”

—(Insuring Agreement I of Policy, Exh. 4)

“This policy does not apply:—

“(d) Under coverages A and B, to any liability

assumed by the insured under any contract or agreement; or to any accident which occurs after the transfer during the policy period of the interest of the named insured in the automobile, without the written consent of the Exchange.”

—(Exclusion (d) of Policy, Exh. 4)

The Sondenaas thus had, and have, no claim on or through the policy itself upon the Exchange.

The theory on which the Sondenaas claim the Exchange is bound to assume their liability is one not explicitly stated in the proceedings. It is that there was an assignment of the policy to Mrs. Sondenaar; and that although this assignment was not made by any method recognized in the policy or in the rules of the Exchange appearing in its manual filed with the Insurance Commissioner, by which the Exchange was bound, nonetheless the Exchange cannot assert that this assignment is invalid by reason of estoppel. The alleged estoppel is based on a conversation between von Borstel and agent Lawrence, at a time when von Borstel was still the owner of the car, apparently on the theory that von Borstel was agent for the Sondenaas in this respect. Estoppel is also asserted with respect to certain transactions occurring after the accident, in particular the acceptance and retention of a premium and the filing

of a document described as Form SR-21. The case thus turns on the Oregon law of estoppel.

We submit that the trial court incorrectly applied the law of estoppel to facts not seriously in dispute in reaching the conclusion embodied in his memorandum opinion and judgment. Although no express findings of fact or conclusions of law were made, the trial court's ultimate decision necessarily implies preliminary findings that certain representations were made in each of the three instances referred to above, that these representations were incorrect, and should reasonably have been known by the maker to be incorrect; that they were made to persons ignorant of the truth, who were without ready means of ascertaining the truth; and that they were relied upon to the prejudice of these persons. Upon the record herein such findings could not properly have been made.

The court will note that the Specifications of Errors 9 through 17 assert as error the omission of instructions which did not relate to the narrow issue actually submitted to the jury. The issues to which these instructions referred were decided by the trial court itself, and in opposition to the Oregon decisions hereinafter cited which those instructions correctly summarized.

The remaining assignments of error relate to the

trial court's decision on motion for directed verdict and on motion for judgment notwithstanding verdict. These motions were made on essentially the same grounds and raise essentially the same issues. They are argued together according to the outline given above.

B. The law of Oregon relating to estoppel is that a party asserting estoppel must show that representations were made by the party against whom estoppel is asserted; that these representations were incorrect, and that the person making them should reasonably have known them to be so; that such representations were made to persons ignorant of the truth and without ready means of ascertaining it; and that such persons relied upon these representations to their prejudice.

Bramwell v. Rowland, 123 Ore. 33, 46-49, 261 Pac. 57;

Myers v. Olds, 121 Ore. 249, 252 Pac. 842;

Scott v. Hubbard, 67 Ore. 498, 136 Pac. 653;

Oregon v. Portland General Elec. Co., 52 Ore. 502, 528, 95 Pac. 722, 98 Pac. 160.

The first incident to which the above principles are to be applied is a conversation held between von Borstel and Lawrence in The Dalles toward the end of June, 1948. What was stated in that interview was the sub-

ject of some dispute between the parties. The version most favorable to the plaintiff, which version the jury's verdict requires us to accept on this argument, may be summarized from von Borstel's direct testimony on pages 63 and 65 of the transcript in the following language:

In order to transfer the policy from von Borstel to his daughter it would^{be} necessary for the daughter to sign the policy. This would have to be done at her first convenience, with Lawrence or her nearest representative at Toledo. In the meantime, this being a transaction within the family, as long as the premiums were paid on the policy, it would cover them.

The issue submitted to the jury was which version should be believed (Tr. pp. 172, 173), and their verdict shows that it was von Borstel's version they chose. The Court could not reasonably have found von Borstel's version to be other than von Borstel himself stated it.

The Court, in deciding against the defendant, must have determined that these representations were made, that they were incorrect, and that Lawrence reasonably should have known them to be correct. The next element, that they were made to one ignorant of the truth and without means of readily ascertaining it, the Court could not properly have found in plaintiff's favor.

It is Oregon law that a party asserting estoppel in

his favor "must show that he exercised good faith and due diligence in endeavoring to ascertain the truth." Here it affirmatively appears that the Sondenaas and von Borstel did not use the required due diligence, and had ready means of ascertaining the truth, which they did not use.

That the law of Oregon is as above stated, and as stated in Specifications of Error 13 and 15, see *Myers v. Olds*, supra, from which the words in quotation marks above are taken; *Bartnik v. Mutual Life Insurance Company of New York*, 1936, 154 Ore. 446, 60 P. (2d) 943, and *American Bank v. Port Orford Cedar Products Co.*, 140 Ore. 138, 144, 12 P. (2d) 1014. See also *State v. School District No. 9*, 148 Ore. 273, 288, 31 P. (2d) 751, 36 P. (2d) 179, and *Bramwell v. Rowland*, 123 Ore. 33, 261 Pac. 57.

Both Elmer and Helen Sondenaas had read the policy after obtaining the car and before the accident (Tr. pp. 107, 118). Von Borstel had it in his possession for ten years and had twice before had changes made in its coverage in the usual fashion by requesting and receiving an appropriate endorsement from the Exchange (Tr. pp. 79, 80; Ex. 4). They all must be held to know what they read, for Ex. 4 is in intelligible English. That policy requires the consent in writing of the Exchange to any transfer of interest before the Exchange shall be

thereby bound (see Condition 18 of Ex. 4, entitled "Assignment").

Moreover, even in von Borstel's version of Lawrence's instructions to him (Tr. pp. 63, 65) and in the version of Elmer Sondenaa (Tr. pp. 106, 108) and Helen Sondenaa (Tr. pp. 116, 117) as to what von Borstel told them, it is clear that they all understood that Lawrence told them to see a representative of the Exchange and get the policy assigned.

The agents they were to see were readily accessible. Judge Gilkey lived in Newport, some nine miles away from the Sondenaa's home, and was listed in the telephone book which the Sondenaa's had (Tr. p. 103). There was also an agent at Corvallis who was listed in the directory. Both these entries appear under the heading of "Farmers Insurance" or "Farmers Inter-Insurance Exchange." (See Exs. 10 and 11.)

And yet the Sondenaa's did nothing to comply with the conditions of the policy which they had read or with the instructions which they understood Mr. Lawrence to have given. As Elmer Sondenaa put it (Tr. p. 108): "We looked for an agent, half-heartedly." This is not the due diligence required by Oregon law of a party asserting estoppel. It is rather more like gross neglect of a known condition for the obtaining of protection.

The facts being as above, the trial court could not, as a matter of law, have found that the Exchange was estopped to assert lack of coverage by these events happening before the accident of October 3, 1948.

C. William Lawrence, with whom von Borstel conversed, had no actual authority to extend the coverage of the policy in any manner whatsoever; and no acts of the defendant are shown which cloaked him with apparent authority to that purpose. Moreover, the power to bind the company to an extension of coverage is one which can be supported only by actual authority in the agent.

Aetna Casualty & Surety Co. v. Block, Texas, 1942, 142 S.W. (2d) 445, reversed on other grounds in 138 Texas 420, 159 S.W. (2d) 470.

Carnes & Co. v. Employers Liability Assurance Corp., CA 5, 101 F.(2d) 739.

Standard Insurance Co. v. Roberts, CA 8, 1942, 132 F.(2d) 794.

Fidelity & Guaranty Fire Corp. v. Bilquist, CA 9, 1938, 99 F.(2d) 333.

Craswell v. Biggs, 160 Ore. 547, 86 P. (2d) 71.

Bartnik v. Mutual Life Ins. Co. of N. Y., 154 Ore. 446, 60 P. (2d) 943.

45 C.J.S. 631, Insurance, §683.

As pointed out above, the policy coverage was stated in the policy not to extend to acts occurring after the transfer during the policy period of the interest of the named insured, von Borstel, in the automobile.

In the *Aetna* case, *supra*, an employer had Workmen's Compensation insurance in force for employees of his drygoods store. He later went into the junk business, for which the premiums were much higher. He inquired of the local agent of the insurer and was told his policy covered those of his employees engaged in the junk business. It was held on appeal that a verdict should have been directed for the defendant insurance carrier. The ground of the decision was the same as that now urged in the present case—viz: an agent not expressly thereto authorized has no power to extend the coverage of a policy.

A similar holding is in the *Carnes* case, *supra*. The liability policy on which suit was there brought covered a truck "handling farm machinery, crane fixtures and paint." After the policy was written, the plaintiff began to use the truck regularly for hauling Butane, a volatile and explosive fuel. This use of the truck, according to the undisputed evidence, was known to the local agents over a long period of time and at the time a renewal policy had been issued. Nonetheless, when a tank of Butane exploded and did considerable damage

the Fifth Circuit held that the risk out of which the loss arose was not within the policy coverage and that neither waiver nor estoppel availed the plaintiff to bring himself within the limits of the policy, stating that these doctrines are available "only to relieve as against the consequences of violation of the terms of a policy and not to extend its coverage." The principle here stated has been recognized in the other cases above cited.

Oregon law is in accord with the above Federal cases. In *Craswell v. Biggs*, supra, the plaintiffs were trying to recover upon a surety bond on which one of their subcontractors was principal and the Aetna Casualty & Surety Company was surety. The contractor and the subcontractor had together called on the defendant insurance company's general agent, a resident Vice-President, to ascertain from him whether an additional surety bond would be needed to cover an additional section of the principal contract which had been awarded to the subcontractor. After thorough discussion and deliberation the general agent had informed them that the existing bond would protect them on the additional work contemplated. The Court's holding was that even so strong a state of facts as this did not change the rule that an agent, without express authority, cannot extend the coverage of an existing policy.

Insurance solicitors are agents of limited authority,

as was the case with Lawrence. It is generally held that in the absence of positive action, or negligent inaction on its part, the insurer is not bound by acts or representations of its soliciting agents, however clearly made. See 45 C.J.S. 631, Insurance, Sec. 683. This rule applies in Oregon, as the *Bartnik* case, *supra*, sufficiently indicates.

It is plain, therefore, that Lawrence had no authority to extend the coverage of this policy in the fashion contended for by the plaintiffs. The plaintiff's case therefore must fail insofar as it rests upon Lawrence's conversation with von Borstel.

D. The plaintiff asserts that defendant's acceptance of a premium paid on November 5 and cashed on November 8 estops the Exchange from asserting the fact of non-coverage. Let us apply the Oregon law of estoppel to this assertion.

The only representation that can conceivably be derived from an acceptance of this premium is one that no grounds for asserting cessation of the policy coverage existed at that time. If it be assumed that such representation was in effect made by the acceptance of this premium, it may likewise be assumed that such representation was incorrect. However, an analysis of the facts as set forth in the testimony shows conclusively

that there was no way the Exchange could have known that the car described in the policy was no longer owned by von Borstel. In the absence of such knowledge, or any notice to that effect, an essential element of estoppel is missing. The Court could not properly have found as a matter of law that this element of knowledge existed.

The facts, which are substantially undisputed, are as follows: On October 5, two days after the accident, Elmer Sondenaa sent a letter to George Moon, former agent of the Exchange in Wasco (Ex. 15). On October 8, according to Exhibit 22, William Lawrence received this letter, was unable to find any record of any such policyholder in his file, and forwarded it to the Exchange. On October 11 (Tr. p. 133) the Exchange received Elmer's letter. This was the first intimation from which notice of the accident could be derived. Part of the text of Exhibit 15 is given at pages 101 and 102 of the transcript; reference to it will show that it was addressed from Toledo, Oregon. On checking the name in their master files, the Exchange found only that a former policyholder, E. G. Sondenaa, had once resided at Toledo, but had dropped or cancelled his policy some years before (Tr. p. 134). On checking by the number given in Elmer's letter, they examined the file on von Borstel's policy and found that it was not on a 1937 Chevrolet (Ex. 15) but on a 1940 Plymouth (Ex. 4)

that the owner's name was von Borstel and not Sondenaa, that he lived at Kent, in Eastern Oregon, and not at Toledo, on the Coast; and nothing in the file gave any indication that von Borstel was no longer the owner (Tr. p. 135), for he had never notified the Exchange to such effect. Some weeks later their conclusions were apparently confirmed by von Borstel's payment of his premium by check dated November 5 and cashed by the Exchange on November 8. (Tr. p. 66; Ex. 5)

Summarizing events to this point, it cannot be reasonably concluded that the Exchange had received any notice or knowledge of the transfer of the car at the time it received and cashed the premium check.

At said time, the Sondenaas were, of course, aware of all the details pertaining to the accident and to the transfer of ownership of the car, and were aware that they had not taken the action which Lawrence had directed them to do (Tr. pp. 107, 108; testimony of Helen Sondenaa, pp. 112, 117). Von Borstel was aware that the accident had occurred (Tr. p. 65) and that the title had been transferred (Ex. 21). The Court could not reasonably have found anything but that these three persons were fully aware of the truth.

Some prejudice to the parties asserting estoppel as the result of their reliance upon representations must

be shown. It does not appear that the Sondenaas were in any way prejudiced by the company's acceptance of this premium.

Bramwell v. Rowland, supra, at pp. 46-7 of 123 Oregon.

Whatever liability the accident of October 3, 1948 might result in for the Sondenaas was a matter as to which the payment of this premium made no different whatsoever. Whether it had or had not been paid, would not have affected the Sondenaas' position in any way. No showing is made in the record that the continuation for a few weeks longer of their expectancy that Farmers Exchange might take care of their liability operated to their prejudice.

On this aspect of the case, the Court could not as a matter of law have found the existence of three at least of the elements essential to a finding that the Exchange's acceptance of the premium paid on November 5 estopped the Exchange from asserting the fact of non-coverage as against the Sondenaas.

E. The contention is also made that the filing of form SR-21, Statement of Financial Responsibility (Ex. 28) operated to estop the Exchange from asserting non-liability.

This statement was an express representation that

von Borstel was the policyholder and insured, that Elmer Sondenaa was the driver, and that the policy furnished coverage to them both under its terms.

That the policy by its terms did not in fact cover either von Borstel or Elmer Sondenaa is undisputed. The Court could not have reasonably found as a fact, however, that the Exchange should then have known that no coverage existed.

The facts that appear from the testimony as to the date and time of information obtained by the Exchange again become significant. On November 10th, or possibly the 9th, a telephone call from attorney Nathan Weinstein, presently of counsel for plaintiff, and therefore not an agent for the Sondenaa's, first advised the Exchange that the car involved was a 1940 Plymouth with the same identifying numbers as that described in von Borstel's policy (Tr. p. 138). The Exchange immediately proceeded to investigate. On November 10, an ownership statement was taken from Elmer Sondenaa (Ex. 12, Tr. 144). On November 13, an accident report was given by von Borstel to an adjuster for the Exchange (Ex. 14). The first of these said that Mrs. Sondenaa was the owner; the second said that von Borstel was. The second came from the policyholder of record. Mr. Weinstein's letter of November 15 (Ex. 20) says nothing about the title. On November 17, the 45th

day after the accident, the last day on which the law relating to financial responsibility could be complied with so as to protect their policy-holder, von Borstel, from revocation of his license, a Form SR-21 was filed describing the car as being owned by von Borstel as registered owner, but driven by Elmer Sondenaa. On November 18, an ownership statement was obtained from Mrs. Sondenaa (Ex. 16).

Failure to file Form SR-21 would have resulted in the consequences set forth in O.C.L.A. Sec. 115-416, which allows a period of 45 days only in which to file such form. If the form had not been filed on time, not only Elmer Sondenaa's license, but also the registration and plates on both von Borstel's automobile and on his truck could have been suspended,—a very serious matter for a farmer. For the protection of their policy-holder, they had to get that notice in on time.

It appears from an inspection of the sequences of dates above, that the information the Exchange had did not enable it to determine with certainty that von Borstel was no longer the registered owner. Von Borstel's own statement on November 13 describes himself as being the registered owner. In the face of this express representation from their policyholder of record, the Exchange had no choice but to consider him still the owner of the vehicle and itself still liable under the in-

surance contract with him to protect him throughout in proceedings relating to the accident.

The trial court could not have reasonably found that the Sondenaas were unaware of the true facts relating to the transfer and present ownership of the car at the time this form was filed. For documentation the Court is respectfully referred to the discussion of the same point in relation to the effect of acceptance of the premium, *supra*.

The Court could not have reasonably found that the Sondenaas relied upon the representation contained in Form SR-21. *Bramwell v. Rowland, supra*, at pp. 46-7 of 123 Ore.

In the first place, it does not appear that either of the Sondenaas ever knew this form had been filed. In the second place, the argument made in the previous section of this brief in relation to acceptance of the premium is again applicable: even had they known this was filed, their liability was already fixed in degree, although undetermined, and no action by the company in filing this form could have increased or diminished it. No recourse to other insurers at that time would have lightened their risk. No action had been begun at that time and they had no pressing need of attorneys. When action was begun, a notice to them from the Exchange was already in the mail; it stated that, after deliberation,

they had at last determined the true state of facts, namely, that coverage under the policy had ended at the time of the transfer of ownership in July, 1948, three months before the accident.

Therefore, as matter of law, the Court could not have found that the Exchange was estopped by the filing of form SR-21 from asserting the fact of non-coverage.

F. Retention of the premium paid on November 5, a date prior to defendant's receipt of any knowledge or notice that its policyholder had transferred the policy to the Sondenaas, does not estop it to assert the Sondenaas were not covered.

Peterson v. Universal Auto Ins. Company, 53 Ida. 11, 20 P. (2d) 1016;

Commercial Standard Insurance Co. v. Robertson, C.A. 6, 1947, 159 F. (2d) 405, 408;

Goorberg v. Western Assurance Company, 150 Calif. 510, 89 Pac. 130, 10 L.R.A. (N.S.), 876.

25 L.R.A. (N.S.) 3,

51 L.R.A. (N.S.) 261,

45 C.J.S. 690, Insurance, Sec. 716 et seq.

The first of the cases above cited is a holding precisely contrary to the position taken by the trial court in the instant case. The *Peterson* case grew out of an accident which occurred a day or so after the car originally covered by the policy had been sold to a condi-

tional vendee. The latter was using the car for his own purposes and in his own right at the time of the accident. The policy contained a provision for termination if there should be any change in the ownership or interest of the named assured in the policy or in the automobile insured thereunder. As in the present case, the insurer first learned of the breach of condition when the loss was reported some time after both the transfer and the accident. After considering its possible liability, the insurer defendant cancelled the policy as of a date two and a half months following the accident, and retained the premium for that period.

Upon trial, a judgment of non-suit against the plaintiff was rendered. Upon appeal the Idaho Supreme Court affirmed the judgment, holding that the fact that the insurance company retained the premiums and did not cancel for some months after the accident in no way prejudiced the assured. In the Court's view, *the rights of the parties were fixed at the time of the loss*. See the discussion in 20 P. (2d) beginning at page 1020, in which additional authorities are cited. To the same effect, see *Commercial Standard Insurance Co. v. Robertson*, C.A. 6, 1947, 159 F. (2d) 405, 408; see also *Goorberg v. Western Assurance Company*, 150 Calif. 510, 89 Pac. 130, 10 L.R.A. (N.S.) 876, cited with approval in the *Peterson* case, in which the Court in part said:

“The defendant is not in this action seeking to rescind the contract sued upon. It is standing upon the contract, and insisting that under its terms there is no liability. Nor can the mere retention of the premium, after the loss has occurred, and where the liability is steadfastly denied, constitute either a waiver of the defense or an estoppel. To constitute such waiver or estoppel by the action or non-action of the insurer after the loss, it is essential ‘that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his actions.’ ”

This view is fully supported by the cases cited in the notes at 25 L.R.A. (N.S.) 3 and 51 L.R.A. (N.S.) 261. To the same effect, see 45 C.J.S. 690, Insurance Sec. 716 et seq.

In the light of the above authorities, the trial court erred as matter of law in finding that defendant was estopped by its retention of premium to assert non-coverage.

III.

Since, as matter of law, defendant Exchange could not have been estopped upon the evidence adduced by the plaintiff as to the conversation between von Borstel and Lawrence, the time of acceptance of the premium, the filing of the Form SR-21, or the retention of the

premium, the trial court should have directed a verdict for the defendant, or granted defendant's motion for judgment notwithstanding the verdict.

The plaintiff's case rested upon the theory that acts of the defendant and its agents had misled the Sondenaas to their prejudice. It has been shown above that the Sondenaas were not justified in relying on what von Borstel told them Lawrence said to him, and that they were not prejudiced by the other three incidents adduced by plaintiff, since they all occurred after the accident, when rights of the parties were fixed, and resulted in no change of position on the part of the Sondenaas. Under these circumstances plaintiff has failed to make out her case.

A Federal Court is required, when a case has plainly failed of proof, to take the matter from the jury by direction of a verdict or other appropriate procedure. See *Brady v. Southern Ry. Co.*, 1943, 320 U.S. 476, 88 L. Ed. 239, 64 S. Ct. 232, in which the Court overruled the contentions of appellant that the court below had usurped the functions of the jury in concluding as a matter of law that there was no probative evidence of actionable negligence on the part of defendant. In this connection the Court said (page 243 of L. Ed.):

“When the evidence is such that without weighing the credibility of the witnesses there can be but one

reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

See also cases there cited. This decision of the Supreme Court is binding upon a Federal District Court. In view of the fact that the elements of plaintiff's case failed of proof, as pointed out above, the trial court should have directed a verdict for defendant, or failing that, should have granted defendant's motion for judgment notwithstanding verdict.

IV—CONCLUSION

In summary, defendant Farmers Insurance Exchange asserts that it is not obligated to the plaintiff's judgment debtor, and therefore not to the plaintiff. Its position is this:

It was bound by contract with Mr. von Borstel to assume liability for damages incurred by him or by persons using the car with his consent as a result of accidents involving the car, so long as he owned it. At the time of the accident from which this suit arose, he no

longer owned it. The risk was therefore not one covered by the contract, and the Exchange is accordingly not liable for consequences of that accident. As shown in the preceding pages, the plaintiff has failed to establish facts sufficient in law to estop the Exchange from asserting as a complete defense to this suit this fact of non-coverage.

Respectfully submitted,

KOERNER, YOUNG, MCCOLLOCH & DEZENDORF,
CLARENCE J. YOUNG,
JOHN GORDON GEARIN,
WILLIAM D. CAMPBELL.

800 Pacific Building, Portland, Oregon,
Attorneys for Appellant (Defendant).

APPENDIX A

GROUND'S OF DEFENDANT'S MOTIONS

Mr. Young: At this time, your Honor, the defendant moves the Court for an order directing a verdict against the plaintiff and in favor of the defendant for the following reasons:

In the first place, under the "Insuring Agreements," Agreement I, Coverage A, the Exchange agrees "to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages * * * because of bodily injury * * *"

Under Insuring Agreement III, "The unqualified word 'insured' wherever used in Coverage A * * * includes not only the named insured but also any person while using the automobile and any person * * * legally responsible for the use thereof, provided that the declared and actual use of the automobile * * * is with the permission of the named insured."

It appears, without dispute, from the evidence that the insured, A. von Borstel, on June 29, 1948, trans-

ferred his Certificate of Title to the 1940 Plymouth to his daughter Helen Sondenaa.

Accordingly, on October 3, 1948, when the accident occurred, von Borstel was not the owner of the car and, therefore, not the insured under the policy.

Moreover, having transferred title to the car to his daughter, von Borstel no longer had the capacity to permit his daughter or anyone else to use the car. Helen Sondenaa, therefore was not an additional insured under the policy.

In the second place, as the owner of the 1940 Plymouth by transfer from her father, Helen Sondenaa acquired no rights under the policy.

Condition (17) titled "Changes" reads: "No notice to any agent or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the Exchange from asserting any rights under the terms of this policy * * *"

Condition (18) titled "Assignment" reads: "No assignment of interest under this policy shall bind the Exchange until its consent is endorsed hereon * * *"

Within the meaning of these two provisions of the policy, the transfer of title to Helen Sondenaa from von Borstel of the 1940 Plymouth automobile, not having

been consented to by the Exchange, through endorsement on the policy, made the transfer of the policy to Helen ineffective.

In the third place, your Honor, Title 101, Chapter 13, O.C.L.A., relating to reciprocal insurance, provides for a form of insurance through the exchange of insurance contracts by members of the organization provided for in the Act. It also provides that insurance contracts may be executed for subscribers by an attorney duly authorized and acting for such subscribers. I refer in this regard to Section 103-1302, O.C.L.A.

Helen Sondenaa was not a member of the Insurance Exchange and, therefore, not eligible for insurance protection.

In the fourth place, your Honor, the insuring agreements and conditions of the policy provide, among other things, that the Exchange agrees with the insured, "named in the Declarations, made a part hereof, in consideration of the payment of the membership fee" and the execution of a power of attorney to the Farmers Underwriters Association, to protect the insured in a certain manner.

There is neither pleading nor proof that Helen Sondenaa ever paid such a membership fee or executed such a power of attorney. Therefore, by the terms of the

policy she could not be entitled to insurance protection.

Fifth, your Honor, the policy of insurance involved herein is an executory contract, in connection with which the personal character of the insured is an important element and, therefore, as a matter of law, not assignable without consent of the parties. Her purported assignment occurred before the accident took place. The consent of the Exchange not having been obtained, the purported assignment was ineffectual. That this policy of insurance involves the personal character of the insured appears definitely from Exhibit 23 which has just been introduced in evidence.

In the sixth place, the alleged statement by District Agent Lawrence of the Exchange, that the policy would have to be "signed by the daughter, but that since the premium was paid and the transaction remained in the family the policy would cover Helen Sondenaar," does not estop the Exchange from asserting non-liability under the policy.

To begin with, there has been no showing whatever in this case that the District Agent had any authority to make such statements, if in fact they were made, or to bind the Exchange by such statements.

Condition (17) of the policy expressly states that the terms of the policy may not be changed or varied

“except by endorsement issued to form a part hereof, signed for Farmers Automobile Inter Insurance Exchange, by an executive officer of its attorney-in-fact, the Farmers Underwriters Association.”

Moreover, as appears without contradiction from the testimony of Mr. Smith, the last witness on the stand, the Manual of the Exchange and the rules and regulations bind these agents, and these agents are not at liberty to alter or change the Manual or the rules and regulations in any regard.

Moreover, your Honor, the purported statement, if it was made at all to von Borstel, was to the effect that the policy would have to be “signed” by the daughter, and that failure by the daughter to sign would render the policy ineffective.

Again, the transaction was not one remaining in the family, in the sense of the family living under one roof, because the von Borstel and Sondenaa families were separate and distinct families, living at remotely located geographical points, the distance between them some 250 miles.

Furthermore, the representations made by Mr. Lawrence were made to von Borstel and not to Helen Sondenaa, and he is the only one who could complain in respect to any representations made, and he has not complained and is not complaining.

Again, there were no representations made in this case to the plaintiff, Louise K. Holm, and she at no time ever acted or relied upon any statement whatsoever made by Mr. Lawrence.

Still again, the provisions of the policy relating to assignment of interest and lack of power in general to change the terms were known to or should have been known to von Borstel, for he had the identical policy in his possession for ten years prior to the transfer of this automobile and, moreover, he knew from his experience in 1940, when he exchanged his earlier Plymouth automobile for the 1940 Plymouth automobile, that instructions to change the policy had definitely been given by him to the Exchange.

In that regard, your Honor, I call your attention to the policy of insurance which is before the Court, and which contains a rider issued to Mr. von Borstel on the 11th day of May, 1942, by the Farmers, wherein it states in so many words that "In accordance with your instructions, coverage on your policy is transferred by this endorsement to cover the car described below instead of as heretofore."

In addition, your Honor, von Borstel had all reasonable opportunity to learn the facts and obviously made no effort whatsoever to do so.

Finally, Helen and Elmer Sondenaa——

The Court: Where are you reading all that from?

Mr. Young: These are some memoranda I prepared. The subject is a little technical and I did not wish to rely on my memory.

The Court: You do not have all that on one page?

Mr. Young: No, your Honor. I have several pages here. Finally, Helen Sondenaa——

The Court: This is the longest motion for a directed verdict I ever heard.

Mr. Young: I always like to break the record, your Honor, if possible. This apparently may be one of those instances, although I thought perhaps by stating this matter in considerable detail your Honor would have before you, in succinct form, all the points we have in mind, to the end that the record will be complete, and your Honor can have before you full opportunity to give consideration to these matters.

The last point I have in mind in this connection is that both Helen and Elmer Sondenaa failed to use reasonable diligence to acquire any knowledge of the facts.

Again, seventh, I call your Honor's attention to this, that retention of the premium by the Exchange does not constitute any estoppel or waiver which would create

any insurance rights in Helen Sondenaa for the reason that at the time the premium was received by the Exchange the evidence shows they did not know what the factual situation was with respect to the title of the car; this is a circumstance which, in any event, occurred after the loss took place, and Mrs. Sondenaa herself had the policy in her possession at this time.

Finally, at the time, or shortly after the time the premium was received the Insurance Exchange put all of the parties on notice that it regarded the situation as being one where there was no coverage, so that retention of the premium cannot here be considered, under any circumstances, as an admission that there was coverage, that circumstance being completely rebutted by letters sent out to the parties.

Finally, Mr. von Borstel has never made any request for the return of the premium.

If the Court please, those are our points.

APPENDIX B**CHARGE OF THE COURT**

The Court: Ladies and Gentlemen, there are a number of questions in this case, but I am only going to submit one to you. I have explained that to the lawyers previously. They argued the case to you somewhat with that background.

The function of a jury, as I know you understand the rules, is to try disputed questions of fact. Questions of law are for the decision of the Court, and there are some questions of law in this case, as you have observed.

It will be your function to decide the dispute as to what was said at The Dalles between Lawrence and von Borstel. There is a dispute between them that you will have to decide. Jurors very often have that very thing to do—to decide where the stories clash and cannot be reconciled. Bad memory or misunderstanding often enter into it. Sometimes one answers one way and the other answers the other way—answers the opposite—and both believe they are telling the truth.

In this case, regardless of what the attorneys have

stated, that is the dispute which I am going to submit to you for decision.

This plaintiff, like every plaintiff, has the burden of proof, and must satisfy you by a preponderance of the evidence, that von Borstel's version of what happened there is the correct one—must prove that to your satisfaction by a preponderance of the evidence, and greater weight of the evidence. If you are so satisfied, your verdict must be for the plaintiff. If you are not so satisfied, your verdict will be for the defendant.

Von Borstel says that he went to Lawrence, the District Agent for these companies at The Dalles, and told him he was giving a Plymouth car to a married daughter who lived in Toledo, and he wanted to know what was necessary to make sure that the insurance on it was good after he gave her the car. That is a rough way of putting it.

He says that Lawrence, the agent, told him that his daughter should go to the company's agent down there in that country where she lived, and that she should "sign the policy." I don't know what that means, and that is one of the things you will have to figure out.

He claims having communicated that to his daughter. Actually, they claim they understood from that, because she was his daughter, the car was still in the

family and the car would remain in the family and the insurance would be good and the insurance would protect her ownership, in accordance with the terms of the policy.

They claim they understood Lawrence to mean that, while she should go down to the agent, it was not an indispensable requirement, and that the insurance would be effective, so long as he turned the car over to her and the policy, as well.

If you believe that story, by a preponderance of the evidence, and if you feel that the daughter and son-in-law acted on it, and, as a result, did not believe under the circumstances it was necessary to make a new application to the company and get the company's approval of the transfer from von Borstel, your verdict should be for the plaintiff.

If you do not believe that by a preponderance of the evidence, and that is if you don't believe von Borstel's version of it, then your verdict will be for the defendant.

That is the only question I submit to you. You are the exclusive judges of the credibility of the witnesses and of the weight and the value of their testimony. You will take the exhibits with you to the jury room and will give them such weight as you feel they are entitled to.

Your verdict must be unanimous. Upon retiring to the jury room you will elect a foreman who will sign your verdict. Take the jury upstairs, Major.

Do not begin to deliberate on the case, Ladies and Gentlemen, until we send up the exhibits.

Swear the Baliff.

United States
COURT OF APPEALS
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FARMERS INSURANCE EXCHANGE, also known
as FARMERS AUTOMOBILE INTER INSUR-
ANCE EXCHANGE,

Appellant (Defendant),

vs.

LOUISE K. HOLM,

Respondent (Plaintiff).

Appeal from the United States District Court
for the District of Oregon.

Honorable Claude C. McColloch, Judge.

RESPONDENT'S BRIEF

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
CLARENCE J. YOUNG,
JOHN GORDON GEARIN,
WILLIAM D. CAMPBELL,

800 Pacific Building, Portland, Oregon,
Attorneys for Appellant (Defendant).

WM. J. PRENDERGAST, JR.,
LEO LEVENSON,
NATHAN WEINSTEIN,

Spalding Building, Portland, Oregon,
Attorneys for Respondent (Plaintiff).

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RESPONDENT'S BRIEF

RESPONDENT'S STATEMENT OF THE CASE

This is an action brought on an automobile insurance policy issued by the appellant. The respondent is a judgment debtor of Elmer Sondenaa alleged by respondent to be insured under said

policy, said judgment arising out of a personal injury caused by said Sondenaa to the respondent on October 3, 1948.

The policy (Exhibit 4) herein involved was issued by the appellant in 1938 to one Von Borstel, father-in-law of the judgment debtor, Sondenaa. The coverage was changed in 1942 by endorsement to cover the automobile involved in the accident. The premiums were paid on this policy to and including November 18, 1948, and thereafter, on or about November 9, 1948, upon being billed by appellant, an additional six months premium was paid (Exhibit 5).

On July 25, 1948 Von Borstel transferred title to the automobile to his daughter, Helen Sondenaa, and a short time prior thereto inquired of one William Lawrence, district agent of the appellant (Tr. pp. 119, 120 and 149), as to the procedure to transfer the policy to his daughter, Mrs. Sondenaa. Lawrence advised Von Borstel that his daughter should sign the policy either with him or the agent near her home but in any event, "being a transaction within the family, as long as the premiums were paid on this policy, that the policy would cover." (Tr. pp. 63, 64).

The Sondenaa's attempted to locate an agency of appellant near their home at Toledo, Oregon, after delivery of the automobile and the policy. On October 3, 1948, returning from the residence of Von Borstel at Kent, Oregon, which is some 300

miles from the home of the Sondenaas, the injury giving rise to the action and the judgment in State Court occurred.

On October 5, 1948 (Tr. p. 91), Sondenaa, the judgment debtor, notified the appellant of the accident (Ex. 15) giving the facts and the policy number, and the appellant, after making some cursory search of its records, did nothing (Tr. pp. 134, 135), the notice of the accident having been received in the office of the appellant about October 8, 1948 (Ex. 22). More than a month later after being billed by appellant another premium was paid (Ex. 5) before any controversy had arisen as to whether the appellant would fulfill its obligation under the terms of the policy. This premium was retained by appellant and has never been refunded nor offered to be refunded.

As a result of a phone call in November of 1948 according to the appellant's witness Porth, appellant's assistant Northwest branch claims manager, who placed the date at November 10, 1948 (Tr. p. 135), an investigation was undertaken. On November 10, 1948, appellant's adjuster Patterson obtained statements from Mr. Sondenaa (Ex. 12) at which time Patterson also saw the automobile certificate of title (Tr. pp. 93, 94). Thereafter on November 13, 1948 appellant obtained two statements from Mr. Von Borstel (Ex. 13 and 14) and on November 18, 1948, appellant obtained statements from Mrs. Sondenaa (Ex. 16). On November

17, 1948, a certificate of financial responsibility (Ex. 28) was filed by the appellant pursuant to the statutes of the State of Oregon setting forth that the appellant carried insurance covering the accident. The action in the state court (Ex. 24) was filed more than a month later and upon the complaint and summons being forwarded to the appellant for defense of the said action under the terms of the policy, the Sondenaas and Von Borstel were informed that appellant assumed no responsibility and would offer no protection to them nor any of them (Ex. 6, 7, 8 and 9). Trial resulted in a judgment in favor of the respondent in the sum of \$12,708.45 and costs and by reason of appellant's failure to pay this judgment, this litigation ensued.

QUESTIONS INVOLVED

1. Were the representations of the appellant to the assured Von Borstel, that so long as the premiums were paid on the policy the transaction being within the family, sufficient to constitute an estoppel?

2. Was the acceptance and retention by the appellant of the premium paid subsequent to the loss, sufficient to constitute a ratification of the transfer of the policy?

3. Was the filing of the certificate of financial responsibility as required by the Oregon law sufficient to constitute a ratification of the transfer of the policy and to create absolute liability on the part of appellant?

4. Was the acceptance of the premium and retention thereof by appellant and the filing of the certificate of financial responsibility as required by the Oregon law sufficient to constitute a ratification of the policy and to create absolute liability on the part of appellant?

I.

The Representations of the Appellant to the Assured Von Borstel That So Long as the Premiums Were Paid on the Policy the Transaction Being Within the Family Were Sufficient to Constitute an Estoppel.

ARGUMENT

In Von Borstel's interview with the district agent Lawrence, appellant's agent with authority "to service policy-holders" (Tr. p. 151), the appellant was advised of the facts and circumstances concerning the proposed transaction by Von Borstel. The appellant, in giving to Von Borstel the information, that so long as the premiums were paid on this policy, the policy would cover, the appellant had every reason to believe that Von Borstel and the Sondenaas would rely upon the information so given. It is evident from the testimony (Tr. pp. 90 and 112) that Von Borstel and the Sondenaas did so rely upon the representations made and that the appellant is, therefore, estopped to deny its consent to the transfer of the policy from Von Borstel to his daughter, Helen Sondenaar.

Whatever may be the rule in some other jurisdictions, the Supreme Court has announced the applicable rule in the State of Oregon in the case of **Fagg vs. Massachusetts Bonding and Insurance Co.**, 142 Or. 358, 19 Pac. (2d) 413. That case in-

volved an action by the judgment creditor of one Mrs. Clarke Day, wife of the owner of the automobile. The policy had been issued in the name of one King, the previous owner. The Court found that the agent of the insurer who, in the Fagg case, was an insurance brokerage company rather than the company's own representative as in the case at bar, had upon inquiry advised the said Day that the assignment of the policy was not necessary nor the consent of the company to such assignment. Upon testimony of the husband of the judgment debtor that, had he been advised to the contrary, he would have procured other insurance, the Court in affirming a judgment for the plaintiff made the following statement:

“The distinction between waiver and estoppel is clearly set forth in *Kimball v. Horticultural Fire Relief*, 79 Or. 133, 154 Pac. 578, in an opinion citing many precedents and quoting with approval the following excerpt from *Dwelling House Insurance Company v. Dowdall*, 55 Ill. App. 622:

“The stipulation in the policy that no agent or other representative of the company shall have power to waive any provisions or condition of the policy may be effective as against an alleged waiver by agreement or contract with an agent or representative, but has no application when the law declares a waiver by estoppel, because of the acts of the company through its agent or representative. Such estoppels do not rest upon the power, or lack of power, of the agent to change the provisions of the policy or waive any of its agreements, but arise in law, because of the acts of the

company through its agent, acting in the scope of his apparent power as its representative.'

"The question of whether or not the defendant was estopped by the acts of its agent from claiming that the insurance policy issued to King did not cover Mrs. Clarke Day, was, in view of the evidence in the case, properly submitted to the jury."

The same principle was announced in **Mercer v. Germania Insurance Company**, 88 Or. 410, 171 Pac. 412, page 414:

"We find here all of the elements of an estoppel within the rule announced in **Page v. Smith**, 13 Or. 410, 414, 10 Pac. 833, and **Oregon v. Portland General Electric Co.**, 52 Or. 502, 528, 95 Pac. 722, 98 Pac. 160. The policy written in 1915 was paid; plaintiff was informed it was all right. This statement was made to a woman ignorant of the truth; it was made by an underwriter of large experience who knew the facts. He must have intended that plaintiff should act upon it and there is evidence that she did rely upon it to her injury. Defendant should not be permitted to escape liability on this policy on the ground that it named A. G. Mercer as the insured."

In **Kimball v. Horticultural Fire Relief**, 79 Or. 133, 154 Pac. 578, the Court recognizing the principle announced in **Insurance Co. v. Eggleston**, 96 U.S. 572, 577, 24 L. Ed. 841, quoted the following excerpt from Mr. Justice Bradley's opinion:

"Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his

policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture."

Appellant in its brief attempts to make a distinction between the forfeiture for condition broken and the question of extending coverage to one other than the named assured.

In the case of **Virginia Auto Mutual Insurance Company v. Brillhart**, 46 S.E. (2d) 380 (Va.), the facts were that the agent of the insurance company, Miss Showalter, prepared documents for the transfer of an automobile on behalf of the buyer and the seller and not on behalf of the insurance company, upon which the insurance company through her had issued a policy of liability insurance. Upon a statement by the seller of the car, Huffman, the named insured, to the buyer of the car, Owens, that he would let the policy go with the car, and without comment from the agent, Miss Showalter whatever, a judgment obtained by the judgment creditor against the buyer was upheld. The Court made the following statement:

"To Huffman and Owens she, Miss Showalter, was the insurance company and their only contact was with her. They had no knowledge of any limitations of her authority. So far as they knew she had full power and authority to protect their interests and in so doing bind her principal.

"Both men testified the conversation which they had with reference to transferring the insurance policy along with the car to Owens took place in her presence and within her hearing. While it is true that she did not take part in the conversation, she did not deny it occurred nor did she in the final analysis deny that she heard it.

"There is no claim by the insurance company that the transfer of coverage under the policy would have increased its risk or would have required a higher premium, nor does it contend that if a formal application had been made to it for that purpose, it would have withheld endorsement on the policy signifying its consent to the transfer of the coverage. . . . In short, the insurance company's position is that because the required endorsement was not actually obtained, the coverage under their policy was not extended to Owens and this although it had been paid for coverage which protected no one.

"An agent with authority actual or apparent to represent the insurer, may undoubtedly waive a forfeiture arising from unauthorized alienation of a right, title or interest in the subject matter of the insurance by consenting thereto . . . or by telling the insured that a written approval or endorsement of consent is unnecessary . . . and a consent may be given and a waiver be effected by the agent without communication with their principal." (Emphasis ours)

Counsel in their brief on this problem cite the cases of *Aetna Casualty & Surety Co. v. Block* (Texas, 1942) 142 S.W. (2d) 445; *Carnes & Co. v. Employers Liability Assurance Corp.* (CA 5), 101 F. (2d) 739; *Standard Insurance Co. v. Roberts*

(CA 8, 1942), 132 F. (2d) 794; **Fidelity & Guaranty Fire Corp. v. Bilquist** (CA 9, 1938), 99 F. (2d) 333.

It will be noted that in each of the foregoing cases the Court found upon a showing that in each instance the risk attempted to be covered under the terms of the policies issued was greater and, therefore, required a higher premium.

In **Aetna Casualty & Surety Co. v. Block**, *Supra*, the employer had a workmen's compensation policy for employees in the drygoods business. The loss sought to be covered in the case was for injury by an employee who was engaged by the same employer in the junk business requiring a substantially higher premium rate.

In **Carnes & Co. v. Employers Liability Assurance Corp.**, *Supra*, an automobile insurance policy was issued to cover liability from the operation of a truck engaged in the hauling of paints, farm equipment and hardware. The loss occurred by reason of the hauling of Butane gas.

In **Fidelity & Guaranty Fire Corp. v. Bilquist**, *Supra*, a fire insurance policy was issued on household goods kept in a building which at the time of the issuance of the policy was used as a dwelling only. Upon subsequent use of the building as a bar, which said use required the payment of a higher rate than the policy originally issued, this Court while not giving judgment for the loss remanded the cause to the Federal District Court of

Washington for the purpose of reforming the policy as the agent knew of the change in the use of the property. In each of the above cases the risk was substantially greater and the premium substantially higher, and it is submitted, that these cases have no application in this cause as it was not contended that there was any greater risk or that a higher premium would be charged and there was no attempt to make a showing to that effect.

Appellant
~~Respondent~~

~~Respondent~~ contends further that the agent Lawrence had neither the actual nor the apparent authority to bind the company in any way. It is submitted that Lawrence was an agent representing the appellant only. It was further testified to by the Northwest branch manager, appellant's witness Smith, that he, Lawrence, had the authority to write insurance, collect the premiums and service the policy holders (Tr. p. 151). In **Commonwealth Casualty Co. v. Arrigo**, 160 Md. 595, 154 Atl. 136, 77 A.L.R. 1250, p. 1254, the Court makes the following statement:

“An agent of the insurer whose duty it is to take or solicit applications for insurance, to forward such applications to the insurer for acceptance, to deliver the policy and to collect the premiums has frequently been held such an agent that knowledge as to matters affecting the risk or conditions of the policy acquired by him while performing such duties will be imputed to the insurer.” **Goebel v. German Ins. Co.**, 127 Md. 419, 96 Atl. 627, 629, Ann. Cas. 1913A 850.

The respondent contends that the effect of breach of Condition 18 of Exhibit 4 is the question primarily involved in this case. It is submitted that irrespective of the rule in other jurisdictions and irrespective of whether or not this is a matter of breach of condition or a question of the extension of coverage the case of **Fagg v. Massachusetts Bonding and Insurance Co.**, Supra, is the law in Oregon under the doctrine of **Erie Railroad Co. v. Tompkins**, 304 U.S. 64, 82 Law Ed. 1188, 58 Sup. Ct. 817, 114 A.L.R. 1487.

II.

The Acceptance and Retention of the Premium Paid to the Appellant Subsequent to the Loss Constitutes Ratification of the Transfer of the Policy

ARGUMENT

In the case of **Hinkson v. Kansas City Life Insurance Co.**, 93 Or. 473, 183 Pac. 24, in an action involving insurance premiums the Court at page 490 quoting from 1 Mechem on Agency, Section 404, stated as follows:

“At the same time, however, the principal cannot be justified in willfully closing his eyes to knowledge. He cannot remain ignorant where he can do so only through intentional obtuseness. He cannot refuse to follow leads, where his failure to do so can only be explained

upon the theory that he preferred not to know what an investigation would have disclosed. He cannot shut his eyes where he knows that irregularities have occurred. In such a case, he will either be charged with knowledge, or with a voluntary ratification with all the knowledge which he cared to have.

"The facts, moreover, may be so patent that for the principal to profess ignorance would merely be to stultify himself. They may be so obvious that the principal, as a reasonable man, cannot be heard to say that he was ignorant of them. The duty to know them may be so interwoven with the proper conduct of the principal's business that he must, as an ordinary business man, be presumed to know them. This latter rule is constantly applied in the case of the directors of corporations, especially of banks, who are ordinarily presumed to know that which the proper performance of their duties would disclose.

"It is also a settled rule of law that where an insurer has knowledge of facts entitling it to treat a policy as no longer in force, and thereafter it receives a premium on the policy, it is estopped to take advantage of the forfeiture. It cannot treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring, and at the same time treat it as valid for the purpose of earning and collecting further premiums."

Cranston v. West Coast Life Ins. Co., 72 Or. 116, 230, 142 Pac. 762.

Allesina v. London Ins. Co., 45 Or. 441, 78 Pac. 392.

It is respectfully submitted, that at the latest, on the 11th day of October, 1948, the appellant in-

insurance company had notice of the loss by reason of its receipt in the Northwest branch office of Sondenaa's letter (Ex. 15). On or about November 9, 1948, appellant cashed the premium check and retained the proceeds thereof and never refunded or sought to refund the same. Appellant takes the position, that it is entitled to retain said premium which, it is submitted, was not due and payable until November 18, 1948. Appellant should not be permitted to treat the policy valid and binding for the purpose of collecting and retaining the premiums and invalid for the purpose for which it was sold, written and paid for. It is submitted that this action even after loss bound the appellant to perform its obligations under its contract of insurance.

In the case of **Roane v. Union Pacific Life Ins. Co.**, 67 Or. 264, 135 Pac. 892, in an action brought on a note given as payment for a release of a claim for life insurance in which no policy had been issued, the insurer refused to surrender the release until some five or six months after receipt thereof and also refused to pay the note executed by its agent to procure the release. The Court at page 277 in reversing an order allowing a non-suit declared as follows:

“The agent Howe executed the note in the name of the defendant. The release was the **fruits** of the compromise contract received by the defendant according to the evidence, the defendant undertook to disaffirm part of the compromise contract, and retain the fruits of

it . . . to repudiate the note, but to retain the release. This the defendant could not do. When a principal wishes to disaffirm the unauthorized acts of his agent, and has knowledge of what his agent has done, he must disaffirm the contract as a whole. He cannot retain the fruits of the contract and repudiate the liabilities."

Appellant contends that no act of the appellant occurring after the loss could in any wise affect the liability of the appellant hereunder and that the rights of the parties were fixed at the time of the loss (Appellant's Brief, p. 44). This Court in the recent case of **State Farm Mutual Auto Ins. Co. v. Porter**, 186 F. (2d) 834, has taken a contrary view and it is submitted that the acts and conduct of the appellant may estop the appellant as well after loss as before.

It is respectfully submitted, that the appellant maintaining a staff of eight or nine adjusters in Eugene, Oregon (Tr. p. 144), cannot receive notice of a loss and ignore the same for more than a month without investigation, without closing its eyes to its responsibility. Appellant cannot after full knowledge treat the insurance policy as void and unenforceable and yet retain an unearned premium without such action constituting a ratification.

III.

The Filing of the Certificate of Financial Responsibility by Appellant as Required by the Oregon Law Was Sufficient to Constitute a Ratification of the Transfer of the Policy and to Create Absolute Liability on the Part of Appellant

Section 115-419, O.C.L.A., as amended by Oregon Laws 1943, Chapter 295, reads in part as follows:

“No motor vehicle liability policy or operator’s policy shall be accepted as proof of ability to respond in damages hereunder unless and until the following requirements of this section are complied with (b) Every motor vehicle policy and every operator’s policy accepted as proof under this Act shall be subject to the following provisions whether or not contained therein:

“The liability of the insurance carrier shall become absolute whenever loss or damage covered by such policy occurs and the satisfaction by the insured of a final judgment for such loss or damage shall not be a condition precedent to the right or obligation of the carrier to make payment on account of such loss or damage.” (Emphasis ours)

The attention of the Court is directed to paragraph 4 of Conditions of plaintiff’s Exhibit 4 reading as follows:

“Any insurance provided by this policy for bodily injury liability or property damage liability shall conform to the provisions of the motor vehicle responsibility law of any state

or province which shall be applicable with respect to any such liability arising from the use of the automobile during the policy period.
”

The appellant with full knowledge of the facts filed its certificate of Financial Responsibility under the provisions of the Statute and under the terms of the policy.

In appellant's brief this matter is discussed at pages 39, 40 and 41 wherein it is contended that Exhibit 14, a report of the accident made by Von Borstel on the 13th day of November, 1948, was the procuring cause of the filing of Exhibit 28, the Certificate of Financial Responsibility. The answer to this contention will be found from an inspection of Exhibit 14 which contains on its face a stamp showing the receipt of the said Exhibit 14 in the claims make-up section of the appellant on the 19th day of November, 1948, two days after the filing of the Certificate of Financial Responsibility on the 17th day of November, 1948. Further the testimony of the witness Elmer Sondenaa (Tr. p. 94) wherein the witness testified that Patterson, the adjuster, had seen the automobile title on the 10th day of November, 1948. Patterson testified as a witness on behalf of appellant and no attempt was made to controvert this testimony of the witness Elmer Sondenaa.

The appellant certainly had full knowledge of the facts on the 17th day of November, 1948, when the Certificate of Financial Responsibility was filed

and it must have considered the policy in full force and effect for the purpose of filing the Certificate (Ex. 28) as required by the Oregon Statute and it should now be estopped to claim the policy was not effective for the purpose of protecting the Sondenaas. The very fact that appellant filed this Certificate of Financial Responsibility gave Sondenaas and Von Borstel the right to retain their driving privileges, the revocation of which would have occurred without this certificate. The purpose of the Oregon Financial Responsibility law being to keep financially irresponsible persons from operating their vehicles on Oregon Highways. In other words the appellant circumvented the provisions and the purposes of the Statute by the filing of the Certificate of Financial Responsibility and now claims that it has no liability therefor.

It is therefore submitted that under the terms of the Statute 115-419, O.C.L.A., as amended, the filing of such Certificate of Financial Responsibility (Ex. 28) created absolute liability in the appellant under the provisions of the Statute and condition 4 of the policy (Ex. 4). The position now taken by appellant that the policy was valid for the purpose of collecting and retaining the premiums and valid for the purpose of continuing the driving privileges of Sondenaas, a financially irresponsible person, but is invalid for the purpose of affording indemnity for loss is certainly inconsistent and untenable.

IV.

The Acceptance of the Premium and Retention Thereof and the Filing of the Certificate of Financial Responsibility Constitutes a Ratification of the Transfer of the Policy and Creates Absolute Liability on the Part of Appellant

The discussion of the last two previous matters fully covers the problem herein involved and at the risk of being repetitious it is briefly submitted to the Court that the appellant insurance company treated the policy in full force and effect for all purposes save and except the purposes for which the policy was purchased, issued and paid for, to protect the parties involved against liability for loss from the operation of the vehicle. The position assumed by the appellant is founded on a strained concept of indemnity insurance. To accept such concept would put Von Borstel and the Sondenaas and other assureds in a precarious and uncertain position. The acts and conduct of appellant led them to assume that they had complete insurance protection afforded by the terms of the policy. To permit the appellant to escape its contractual obligations by reason of its own misrepresentations and conduct would certainly be unjust, unfair and inequitable.

ANSWER TO APPELLANT'S SPECIFICATIONS OF ERROR

Appellant in its brief submitted to the Court seventeen Specifications of Error. With respect to Specifications 1, 2 and 3, it is submitted that the evidence is not hearsay. All of the parties concerned in the said statement were before the Court subject to cross-examination and the witnesses Von Borstel and Elmer Sondenaa and Helen Sondenaa were cross-examined about the said statement. The witness Lawrence appeared as appellant's own witness.

In Wigmore on Evidence, 3rd Ed., Vol. 5, para. 1370 and 1371, pages 50-53, the following rule is laid down:

"The hearsay rule excludes testimonial statements not subject to cross-examination (ante para. 1362) when, therefore, a statement **has already been subject to cross examination** and is hence admitted as in the case of a deposition or testimony at a former trial—it comes in because the rule is satisfied—not because an exception to the rule is allowed. The statement may have been made before the present trial, but if it has already been subjected to proper cross examination, it has satisfied the rule and needs no exception in its favor.

"The principle requiring a testing of testimonial statements by cross examination has always been understood as requiring, not necessarily an actual cross-examination but merely an opportunity to exercise the right to cross examine if desired." (Emphasis ours)

The above rule laid down by Wigmore is adopted by American Law Institute Model Code of Evidence, Rule 503, pages 231-232.

With respect to Specification of Error 2, Patterson was an agent of appellant charged with adjusting the loss and testified in behalf of the appellant concerning the alleged admission (Tr. pp. 143, 144) and the parties were all present subject to cross-examination and the evidence was clearly admissible.

It is submitted with respect to Specification of Error 4 that the facts being in dispute in this cause the question of estoppel was properly submitted to the jury. As stated in 19 Am. Jur., Estoppel, para 200, pages 855-856:

“The rule is well established that it is a question of law for the court, in any proceedings, even though the case may involve a trial by jury, whether the facts constitute an estoppel, if the facts are undisputed. . . .

“It is a firmly-settled principle that the question of the existence of an estoppel is a question to be settled by the triers of the facts where there is a dispute as to the facts involving estoppel.”

Certainly there was sufficient evidence to go to the jury in this case as to whether or not an estoppel existed.

The appellant complains in Specification of Error 5 that the Court instructed the jury that if they did not believe by a preponderance of the evi-

dence Von Borstel's version of the conversation with Lawrence, that they should find for the defendant. It is submitted that the plaintiff having the burden of the proof of this issue, the instruction is fair and unbiased. The Court merely instructed the jury in order to find for the plaintiff they must find the plaintiff had sustained the burden of proof required.

The appellant complains in Specification of Error 6 that the Court submitted a one-sided version of the evidence to the jury.

A reading of the charge can hardly put the summary of the evidence quoted by the Court in the same category as the summary given in the case of **Virginia Railroad Co. v. Armentrout**, 166 F. (2d) 400, 4 A.L.R. (2d) 1064. It is submitted that the comment was fair and not one-sided or warped so that appellant could complain of being prejudiced thereby.

With respect to Specifications of Errors 7 and 8, the discussion of the questions involved herein contained in this brief covers fully the contentions of appellant as set forth in said Specifications. To enlarge upon them would be merely repetitious.

With respect to Specifications of Errors 9 to 17 inclusive the Court submitted to the jury only the question as to whether or not the version of the conversation testified to by Von Borstel was true and the jury was fairly apprised as to the burden placed upon the respondent in regard to proof of

the facts. The jury found that the conversation did take place as testified to by Von Borstel and it is submitted that the instructions fully covered the problem involved. There was no dispute as to the fact of payment of the premium and the retention thereof; there was no dispute as to the fact of the filing of the Certificate of Financial Responsibility and there was nothing in the said problems for the jury to pass on. The charge by the Court covered the situation fully and was fair and unbiased and cannot be condemned for its conciseness and brevity.

CONCLUSION

It is submitted that the acts and the conduct of appellant insurance company constitute an estoppel to deny the valid transfer of the insurance policy to the Sondenaas and to afford them protection thereunder. There is no showing of any increase in the risk; the appellant got what it bargained for and now refuses to provide that which the insureds bargained for; it has treated the policy as effective for the purpose of collection and retention of the premiums; for the further purpose of permitting a financially irresponsible person to drive an automobile on the highways of the state in circumvention of the financial responsibility law of the State of Oregon and not effective for the purpose of providing protection bought and paid for. It has agreed to indemnify this respondent under the terms of the Financial Responsibility Act and now seeks to say that it has no liability. Appellant has been fully compensated not only for the premium payable at the time of the loss but for a premium payable for a period of seven and one-half months beyond the date of the loss. It seeks to claim as a matter of right the fruits of the contract and to deny its responsibilities thereunder.

ATTORNEYS' FEES

It is submitted that respondent is entitled to attorneys' fees on this appeal under the provisions of Section 101-134, O.C.L.A., providing in part as follows:

“ . . . If attorney fees are allowed as herein provided and on appeal to the Supreme Court by the defendant the judgment is affirmed the Supreme Court shall allow to the respondent such additional sum as the Court shall adjudge reasonable as attorney fees of the respondent on such appeal.”

and that the said Statute applies to policies of reciprocal insurance such as the one herein involved as determined by the Supreme Court of this state, in the case of **Whitlock v. United States Inter Insurance Association**, 138 Or. 383, 6 Pac. (2d) 1330.

It is, therefore respectfully submitted that the judgment in this cause should be affirmed with such sum as this Court deems to be reasonable as attorneys' fees in this Court.

Respectfully submitted,

Wm. J. Prendergast, Jr.,

Leo Levenson,

Nathan Weinstein,

Attorneys for Respondent (Plaintiff).

~~ORIGINAL~~

No. 12785

In The
United States Court of Appeals
For the Ninth Circuit

FARMERS INSURANCE EXCHANGE, also known as
FARMERS AUTOMOBILE INTER INSURANCE
EXCHANGE, *Appellant (Defendant)*

vs.

LOUISE K. HOLM, *Respondent (Plaintiff)*

Appeal from the United States District Court
for the District of Oregon.

HONORABLE CLAUDE C. McCOLLOCH, Judge

Appellant's Reply Brief

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
CLARENCE J. YOUNG
JOHN GORDON GEARIN
WILLIAM D. CAMPBELL

800 Pacific Building, Portland, Oregon
Attorneys for Appellant (Defendant)

W. J. PRENDERGAST, JR.,
LEO LEVENSON
NATHAN WEINSTEIN

Spalding Building, Portland, Oregon
Attorneys for Respondent (Plaintiff)

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PAUL F. O'BRIEN,
CLERK

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In the
United States Court of Appeals
for the Ninth Circuit

FARMERS INSURANCE EXCHANGE, also known as FARMERS
AUTOMOBILE INTER INSURANCE EXCHANGE,
Appellant (Defendant)

vs.

LOUISE K. HOLM, *Respondent (Plaintiff)*

Appeal from the United States District Court
for the District of Oregon

HONORABLE CLAUDE C. McCOLLOCH, Judge

Appellant's Reply Brief

I. REBUTTAL ARGUMENT

1. The present case is ruled by *Craswell v. Biggs*,
1939, 160 Ore. 547, 86 P. (2d) 71.

The issues in that case which are identical with those
in the present case include the authority of an agent to
create an estoppel against his principal, the power of
an agent to extend coverage of a bond when not ex-
pressly authorized, and the effect to be given to a con-
versation about a future transaction. In essentials, the
acts of the *Craswell* case are similar to those of the

present case. There a general contractor sued a defaulting subcontractor and the surety on his bond for a loss arising from the subcontractor's default on the second of two sections of the principal contract. The surety had bonded the subcontractor on the first section, and it was the plaintiff's contention that the coverage of that bond had been extended to include work on the second section by means of a conversation with the surety company's resident vice president. The court found against the plaintiff.

At page 557 of the Oregon Report, the court says:

"An agent's statement is not binding upon his principal unless the agent was acting within the scope of his authority, either real or apparent."

The court goes on to hold that the agent in question, despite the office he held—

"had no real or apparent authority to extend the coverage of the bond."

In regard to estoppel and waiver the court further says, at page 567 of the Oregon Report:

"The defendant surety company is not bound by any estoppel or waiver unless it be established that the waiver or the estoppel resulted from the acts of an agent who possessed authority to create a waiver or an estoppel."

The language and the holding of that case are directly applicable to the case at bar.

2. Unlike the case at bar, in the *Fagg* case an agent having authority to bind his principal in that respect was held to have bound the company by orally consenting to a transfer of an insurance policy.

Respondent asserts that the case of *Fagg v. Massachusetts Bonding and Insurance Co.*, 142 Ore. 358, 19 P. (2d) 413, controls this case. It does not. The facts are: The owner of the car involved in the accident had transferred it to another person, whose name was Day. The former owner and Day together consulted the president of an incorporated agency which was the general agent for Oregon for the defendant insurer. The original owner and policyholder explained to the president of the agency that he had transferred the car to Day, and asked him whether it would be necessary to obtain the insurance company's consent in order to make the policy available to Day and his family. The president of the agency told both men that no consent would be necessary. Thereupon Day, the new owner, paid to the president of the corporate general agent of defendant the premium then due on the policy, which the former owner had not yet paid. Surely no clearer case of consent to and ratification of an assignment by an authorized agent could have been presented.

Contrast the case now before the Court, where a proposed, rather than a consummated, transaction was discussed with a solicitor, a man of limited authority; and where according to the testimony of von Borstel, the owner and policyholder, (Tr. pp. 63, 65) the agent told him not that no consent was needed, *but that the new owner would have to sign for the policy*. (Respondent's brief nowhere mentions this portion of the agent's statement.)

Moreover, in discussing the authority of agent Lawrence, who made the disputed representations, respondent elsewhere states that Lawrence had the authority to write insurance. As appears from Tr. p. 151, this statement is false. Lawrence had merely authority to solicit insurance. What is more, as in the *Craswell* case, *supra*, he had no authority whatsoever to give the Exchange's consent to the sale, transfer or assignment of insured property. Contrast the *Fagg* case, where the Court found at page 370 of the Oregon report that the insurer's general agent—

“had authority to solicit and write insurance and to fill out the necessary papers consenting to the sale, transfer or assignment of insured property.”

It thus appears that the *Fagg* case differs from the present case on exactly those points which are required to

create an effective estoppel, for (1) the agent in the case now before the Court had no authority to extend the coverage of the policy to a new owner (2) the statements he made, taking von Borstel's version, made it clear that some papers had to be signed at the new owner's first convenience, (3) and the agent never saw or spoke to the new owner, nor ever knew until after the accident that the proposed transfer had been carried out.

3. Even in its own jurisdiction, *Virginia Mutual Auto Ins. Co. v. Brillhart* is not good authority for the point for which respondent cites it.

Respondent quotes a long statement from *Virginia Automobile Mutual Insurance Co. v. Brillhart*, 1948, 187 Va. 336, 46 S.E. (2) 377, as authority that a mere soliciting agent may extend the coverage of policy to a new owner as respondent alleges was done in the present case. The case is in flat contradiction with cases cited in appellant's opening brief at page 33. Moreover, the Virginia Court's opinion in that case gives no indication that its attention was drawn to this rule or that it had the point in mind. No other Virginia case in accord with it was found. If good law, it overrules, without mentioning, *Foreman v. German Alliance Ins. Co.*, 1905, 104 Va. 694, 52 S.E. 337, 113 Am. St. Rep. 1071, 3 L.R.A. (NS) 444, holding squarely and expressly that the

knowledge acquired by the insurer's *general* agent acting outside of the scope of its agency would not be imputed to the insurer unless present in mind when later acting for the insurer. The authority of the case is further weakened by a consideration of *Royal Indemnity Co. v. Hook*, 1931, 155 Va. 956, 157 S.E. 414, on which the Court in the *Brillhart* case expressly bases its decision, and on two more recent Virginia cases, *State Farm Fire Insurance Co. v. Rakes*, 1948, 188 Va. 239, 49 S.E. (2) 269, and *Ambrose v. Acacia Mutual Life Insurance Co.*, 1949, 190 Va. 189, 56 S.E. (2) 372. The first of these three cases holds an insurance company is bound by knowledge relative to the ownership of a car acquired by a soliciting agent in the course of arranging an application for insurance. The two cases last cited hold the same, and cite as authority for their decision the *Brillhart* case. It is thus apparent that in the *Brillhart* case the Court was not aware that it was not merely following the general rule that knowledge acquired by an agent within the scope of his agency is imputable to his principal. The case thus cannot be regarded as good law even in Virginia. Even if the case were respectable authority, nonetheless it could not stand against the squarely opposed holdings in Oregon, of which *Bartnik v. Mutual Life Insurance Co. of New York*, 1936, 154 Ore. 446, 60 P. (2) 943, is typical.

4. The evidence indicates that the extension of coverage contended for by respondent would probably have increased the risk. The language quoted from *Virginia Mutual Auto Insurance Co. v. Brillhart*, supra, by respondent at page 10 of his brief, indicates that this fact may be of some slight importance, and respondent accordingly makes an attempt to bring himself within this rather unreliable case by pointing out that in many of the cases cited in appellant's brief the risk which the policy was supposed to have been extended to cover was a greater one calling for a higher premium. Appellant cannot see a distinction in this regard between those cases and the present one. Respondent made no showing that the risk in the instant case would not be increased by extending coverage to Elmer Sondenaar. Having never had an application from either of the Sondenaas, appellant has no knowledge as to whether the risk would have been increased or not. Nonetheless, appellant did introduce testimony through Mr. Smith (Tr. p. 153) indicating that the personal record of an applicant was an important factor in estimating the risks. Moreover, the Court will take judicial notice of the physical features of its own jurisdiction; and the Court therefore knows that Kent, in Eastern Oregon, lies in relatively flat and open country where the weather is normally dry, and that Toledo,

where the Sondenaas live, is in the foothills of the Coast Range of Oregon, where the roads twist among the densely forested hills, pavements are frequently wet and logging trucks add to the hazard. This much at least is true: that it cannot be said as a matter of law that a twenty-three year old boilermaker with no assets to his name, who lives in a hilly, rainy, logging area, is a better risk for an automobile insurance policy than a fifty-three year old substantial farmer living in dry and level farming country.

5. No issues of estoppel or waiver were present in *State Farm Mutual Auto Ins. Co. v. Porter*, and on the facts the cases are even farther apart. This case was decided by this Court in 1950, 186 F. (2) 834, rehearing denied February, 1951. At page 16 of his brief it is asserted that this case holds that acts of the insurer after loss may estop an insurer from relying on the facts of non-coverage. The case lays down no such rule. This Court there held that the facts of that case established that coverage existed under the policy *at the time of the accident*. The Court therefore refused both in its original opinion and its per curiam opinion denying the petition for rehearing to consider the issues of estoppel and waiver, also argued by the parties. In the case now before the Court, it is quite clear there was no coverage

applicable to the Sondenaas at the time of the accident, and the case is therefore not relevant on this point.

It may be further noted that the *Porter* case was decided under California law. Whatever may be the law in that state, in Oregon estoppel can be founded only on acts on which plaintiff relies to his prejudice and so necessarily on acts or representations made to the insured before the loss. See cases cited at page 29 of appellant's opening brief.

6. Under the Oregon statutes the filing of a Form SR-21 by appellant had no effect whatsoever upon its liability under its policy with von Borstel.

Respondent contends that appellant's action in filing a Form SR-21 made the appellant absolutely liable to any persons injured as the result of the accident, without regard to the underlying contract of insurance. In this respondent is plainly in error.

This form is called for by the next to the last sentence of O.C.L.A. Sec. 115-416, subsection (a). Section 416 requires the Secretary of State within forty-five days of receiving an accident report to suspend the license of an operator and the plates and registration of the owner of any car involved in the accident if it resulted in damage to property or injuries to persons, unless the owner or operator has sooner filed proof of financial responsi-

bility. This section did not apply to von Borstel, in the present case, for by Section 416 (a) 2, persons having in force a standard automobile liability policy at the time of any such accident are exempted from the application of this statute. The fact that such a policy was in force is established by the certificate of the insurer on Form SR-21, as required by Section 416, as last amended by O.L. 1945, c. 144:

“Upon receipt of notice of such accident, the insurance carrier or surety company which issued such policy or bond shall furnish for filing with the Secretary of State a written notice that such policy or bond was in effect at the time of the accident.”

Exactly this course of action was followed in the present case on behalf of von Borstel, appellant's policyholder. It will be recalled that on appellant's records von Borstel was still the owner of the 1940 Plymouth involved in the accident, and that as recently as three days before the filing of Form SR-21 he had told the Exchange's agent that he was the registered owner thereof. It is thus apparent that filing of the form had no effect on the insurer's liability, but served only to prevent the suspension of von Borstel's several registrations and plates otherwise required by Section 115-416.

It is further to be noted that under O.C.L.A. Section 115-419, the insurer's liability becomes absolute "when- ever loss or damage covered by such policy occurs," (O.C.L.A. Sec. 115-419 (b) 1, as amended by O.L. 1943, c. 295), not "when Form SR-21 is filed." This language was apparently chosen to prevent avoidance of the policy to the detriment of persons already damaged or injured by the policyholder's breach of such conditions subsequent as the usual requirements of prompt filing of the proof of loss, prompt notification of accident, and full cooperation of the insured with the insurer. If this meaning were not clear from the words themselves, it becomes so upon consideration of Section 419 (b) 3, as amended by O.L. 1943, c. 295. That section states that in cases where the insured has breached the policy the insurer may require reimbursement from him for any damages it has had to pay to the injured person under the absolute liability statute above quoted; that section further allows an insurer to defend against the demands of the injured person in excess of the statutory financial responsibility limits by asserting the breach of conditions subsequent on the part of the insured.

Thus the very statutes cited (and misquoted) by respondent speak for appellant's position. These statutes make plain a legislative policy that liability shall be imposed only when loss or damage occurs which is

covered by the policy. There was no coverage in the case now before the Court.

II. COMMENT ON RESPONDENT'S ANSWER TO APPELLANT'S BRIEF

1. Respondent appears to concede appellant's specification of error No. 4. See page 22 of respondent's brief, where it is conceded that the question of estoppel should have gone to the jury. However, it is also apparent that respondent believes that the issue of estoppel was so submitted.

As appears from the charge of the Court (given in full in Appendix B, pages 57 to 60 of appellant's brief), and as respondent states on page 23 of her brief, the only question submitted was the narrow one whether von Borstel's or Lawrence's version was the one the jury believed. The Court found the facts constituting estoppel itself, so far as appears.

Appellant's position, of course, is that as matter of law the evidence was insufficient to justify a finding of estoppel. However, if there had been evidence of all the elements of estoppel, we agree with respondent that under those circumstances the issue of estoppel should have been submitted to the jury. The case of *Fagg v. Massachusetts Bonding and Insurance Co.*, *supra*, so

holds. If there was such evidence of all elements of estoppel, then the Trial Court erred in failing to submit this issue to the jury in its entirety.

2. Respondent fails to meet appellant's contention that the trial court erred in failing to charge evidence favorable to defendant as well as that unfavorable to it.

Respondent says nothing in reply to appellant's contention set forth at pages 23 to 26 of its opening brief that a federal trial court must give both sides of the evidence in commenting thereon or in summing it up, and that its failure so to do, over objection, is prejudicial error requiring reversal.

As respondent points out, the Trial Court's charge in the present case was not so grossly prejudicial as that of the Court in *Virginia Railroad v. Armentrout*, 166 F. (2) 400, 4 A.L.R. (2) 1064, for that was an extreme example, but as indicated in appellant's opening brief referred to above, the charge need not reveal the judge's prejudice, if any; it is enough if it fails to give a summary of both sides of the evidence upon a disputed point. *Sperber v. Connecticut Mutual Life Insurance Co.*, CA8, 1944, 140 F. (2) 2, cert. den. 321 U. S. 798, 88 L. Ed. 1087, 64 S.Ct. 939. The Court's error in this respect was further aggravated in that the summary of von Borstel's version given in the charge omitted two qualifi-

cations, both favorable to defendant, which von Borstel had indicated were a part of Lawrence's statement to him. See appellant's opening brief, pages 23-26, and see Tr. pp. 63, 65.

CONCLUSION

Though it is regularly held that a contract of insurance will be construed most strictly against the insurer and in favor of the assured, it has not yet been held that the contract can be wholly disregarded. Policies are not written to protect all the world, or even to protect all successors in title to particular automobiles or other personal property. They are written to protect the interest of an individual; and when the individual named in the policy has no interest in the subject matter of the contract, the policy is void. This was the difficulty that confronted the Oregon Court in *Mercer v. Germania Ins. Co.*, 88 Ore. 410, 171 P. 412.

The purpose of the policy in the present case was to protect Mr. von Borstel from any liability to which he might be exposed by reason of his ownership, maintenance or use of a particular vehicle. The policy furnished no coverage beyond the period of his ownership, use or maintenance, and in being so limited in time was in complete compliance with O.C.L.A. Sections 115-418

and 115-419, as amended by O.L. 1943, c. 295. ^{Stran-}~~Stan-~~gers to the contract, such as the Sondenaas, have three courses of action if they wish to recover either on the contract or upon quasi-contract against the insurer. They may bring themselves within its plain terms. This has not been done in the present case. They may alternatively show that the insurer, by waiver or ratification, recognized them as parties to the contract. Respondents have failed in this also. Finally, they may attempt to show that the insurer is estopped to assert the fact that they are strangers to the contract. Respondents have likewise failed in this course.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH &
DEZENDORF,

CLARENCE J. YOUNG,
JOHN GORDON GEARIN,
WILLIAM D. CAMPBELL,

800 Pacific Building,

Portland 4, Oregon,

Attorneys for Appellant (Defendant)

No. 12785

In The
United States Court of Appeals
For the Ninth Circuit

FARMERS INSURANCE EXCHANGE, also known as
FARMERS AUTOMOBILE INTER INSURANCE
EXCHANGE, *Appellant*

v.

LOUISE K. HOLM, *Respondent*

PETITION FOR REHEARING

Upon Appeal From the United States District Court
For the District of Oregon

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
CLARENCE J. YOUNG
JOHN GORDON GEARIN
WILLIAM D. CAMPBELL

800 Pacific Building, Portland, Oregon
Attorneys for Appellant

W. J. PRENDERGAST, JR.,
LEO LEVENSON
NATHAN WEINSTEIN

Spalding Building, Portland, Oregon
Attorneys for Respondent

In the
United States Court of Appeals
For the Ninth Circuit

FARMERS INSURANCE EXCHANGE, also known as FARMERS
AUTOMOBILE INTER INSURANCE EXCHANGE,
Appellant

v.

LOUISE K. HOLM, *Respondent*

PETITION FOR REHEARING

Upon Appeal From the United States District Court
For the District of Oregon

TO THE HONORABLE JUDGES OF THE UNITED
STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT:

Comes now Appellant and petitions the Court for a
rehearing herein for the reasons here set forth.

I

Although the Court in its opinion filed herein on
August 6, 1951, states that "the only substantial" ques-
tion is the issue whether von Borstel's version of Law-
rence's statement estopped the Exchange from reliance
on the exclusions of the policy, nonetheless the opinion

reflects a misapprehension both of Appellant's argument and of applicable Oregon law.

(a) Appellant argued that the trial judge incorrectly determined plaintiff had proven all the elements laid down in Oregon cases as essential to an estoppel. This Court's opinion entirely disregards the absence of these elements required by the Oregon law of estoppel.

(b) Although the Court correctly notes that Oregon recognizes a distinction between waiver and estoppel, the opinion incorrectly assumes that Appellant's argument was based on a *lack of authority in Lawrence to waive* policy provisions. Appellant in fact argued that whether or not Lawrence had apparent authority to waive forfeiture (such authority not being conceded) was immaterial, since the actual issue was whether Lawrence could, *without express authority, extend the coverage* of the policy to risks which the contract itself excluded. This question, vital though it is, was disregarded by the Court.

(c) The effect of this misapprehension is clearly illustrated in the weight which the Court gives to the *Fagg* case.* In the *Fagg* case the Oregon court was deal-

* *Fagg v. Mass. Bonding & Ins. Co.*, 142 Ore. 358, 19 P. (2) 413.

ing with a waiver of a forfeiture by estoppel; in the instant case, the Court is dealing with an attempted extension of the policy coverage by estoppel. In the *Fagg* case a general agent expressly empowered to grant waivers did the acts which were held to estop the company to deny that the forfeiture had been waived; in the instant case the agent was one of limited authority. The *Fagg* decision is therefore not adverse to but entirely consistent with Appellant's position herein.

II

The trial court, in submitting to the jury the single question whether von Borstel's or Lawrence's version of their conversation was to be believed, restated for the jury only plaintiff's evidence on this question, and stated even that evidence with an incompleteness highly prejudicial to Appellant. This Court on appeal held that in so doing the trial court committed no reversible error. In so holding, the decision of this Court is squarely in conflict with recent and well-reasoned decisions of the Third, Fourth and Eighth Circuits, and with decisions of the Supreme Court on which the intermediate courts relied.

III

The Court applied erroneous principles of law in reaching its decision, for in matters of substance it has failed to follow Oregon law.

(a) Under Oregon law the rights of the parties to this action were fixed at the time of the accident, and nothing that happened thereafter could affect the existence or absence of an estoppel based on the von Borstel-Lawrence conversation. Nonetheless this Court, in reaching the conclusion that an estoppel did arise from that conversation, states that "it is of consequence" that certain matters happened after the accident.

(b) One of the reasons which the Court adduces to support its conclusion that an estoppel arose from the von Borstel-Lawrence conversation was that long subsequent thereto the Exchange "formally assumed responsibility for the accident under the state Financial Responsibility Act." Neither Oregon statutes nor Oregon case law attaches any such drastic consequences to the filing of a Form SR-21, irrespective of whether an issue of ratification or of estoppel is involved.

We submit that the Court should grant a rehearing in order that its opinion may be directed to the issues

present in the case and argued heretofore, and that its decision may be corrected to conform to the governing Oregon law and to the unanimous rulings of other Federal Courts.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF

CLARENCE J. YOUNG

JOHN GORDON GEARIN

WILLIAM D. CAMPBELL

Attorneys for Appellant

I, Clarence J. Young, one of counsel for Appellant, hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for the purpose of delay.

CLARENCE J. YOUNG

No. 12795

United States
Court of Appeals
for the Ninth Circuit.

ALI RASCHID, Named in the Indictment as
Rudolph LaMarr,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

No. 12795

United States
Court of Appeals
for the Ninth Circuit.

ALI RASCHID, Named in the Indictment as
Rudolph LaMarr,
Appellant.
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

LOREN MILLER,

HAROLD J. SINCLAIR,

407 Stimson Building,
129 West Third Street,
Los Angeles 13, California.

JACOB KALINA, ESQ.,

Lyon Building,
Seattle, Washington,

For Appellant.

J. CHARLES DENNIS,

JOHN E. BELCHER,

1017 U. S. Court House,
Seattle 4, Washington,

For Appellee.

United States District Court, Western District of
Washington, Northern Division

No. 48,115

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUDOLPH LaMARR,

Defendant.

INDICTMENT

The Grand Jury charges:

Count I.

That on or about May 15, 1950, the defendant, Rudolph LaMarr, did knowingly and unlawfully persuade, induce and entice Enola McMath, a female, who had not attained her eighteenth birthday, to go from Seattle, in the Northern Division of the Western District of Washington, by common carrier, to Portland, in the State of Oregon, with the intent on the part of the defendant Rudolph La Marr that she, the said Enola McMath, be induced to engage in prostitution and debauchery.

All in violation of Sec. 2423, Title 18, U.S.C.

Count II.

That on or about May 15, 1950, the defendant, Rudolph LaMarr, did knowingly and unlawfully persuade, induce and entice Beverly June Allen, a female person, to go from Seattle, in the Northern Division of the Western District of Washington,

to Portland, in the State of Oregon, with the intent on the part of said defendant Rudolph LaMarr that the said Beverly June Allen should engage in the practice of prostitution and debauchery, and the said defendant Rudolph LaMarr did thereby knowingly cause said Beverly June Allen to go and to be transported as a passenger upon the line and route of a common carrier in interstate commerce from Seattle, Washington, to Portland, Oregon.

All in violation of Sec. 2422, Title 18, U.S.C.

A True Bill.

/s/ DAVID E. LOCKWOOD,
Foreman.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN F. DORE,
Assistant United States
Attorney.

[Endorsed]: Filed July 13, 1950.

[Title of District Court and Cause.]

GOVERNMENT'S REQUESTED
INSTRUCTIONS

Comes now the United States of America, plaintiff herein, and respectfully requests this Honorable Court to give the following instructions in the above-entitled cause:

Instruction No. 1

The defendant, Rudolph LaMarr, is charged in two counts in the Indictment with violating what is commonly known as the White Slave Traffic Act. In the first count, that on or about May 15, 1950, the said defendant did knowingly persuade, induce and entice a female, Enola McMath, who had not attained her eighteenth birthday, to go from Seattle, Washington, to Portland, Oregon, with the intent and purpose of the said Rudolph LaMarr that said Enola McMath be induced to engage in the practice of prostitution and debauchery, and did knowingly cause the said Enola McMath to go and be carried as a passenger upon the route of a common carrier in interstate commerce from Seattle, Washington, to Portland, Oregon.

In the second count, the defendant Rudolph La Marr is similarly charged with respect to one Beverly June Allen, at the same time and on the same day.

To these charges the defendant has entered a plea of not guilty, which places upon the prosecution the burden of proving the truth of every material allegation of the Indictment beyond a reasonable doubt.

If you have reasonable doubt under the evidence of the truth of any material allegation of the Indictment, it is your duty to acquit the defendant. However, if you have no reasonable doubt under the evidence as to the truth of any material allegation, then it is your duty to convict the defendant.

Instruction No. 2

The statute under which the defendant is charged in Count I of the Indictment reads:

“Whoever knowingly persuades, induces, entices, or coerces any woman or girl who has not attained her eighteenth birthday, to go from one place to another by common carrier in interstate commerce * * * with intent that she be induced or coerced to engage in prostitution, debauchery or other immoral practice * * *” (shall be punished as therein provided).

Sec. 2423, Title 18, U.S.C.

Instruction No. 3

The statute under which the defendant is charged in Count II of the Indictment reads as follows:

“Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate commerce * * * for the purpose of prostitution or debauchery, or for any other immoral purpose, or with intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce * * *” shall be punished as therein provided.

Sec. 2422, Title 18, U.S.C.

Instruction No. 4

The Act of Congress forbids any person to knowingly persuade and induce any woman or girl to go from one place to another in interstate commerce for the purpose of prostitution or debauchery, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, whether with or without their consent.

The term "interstate commerce" as used in the Indictment herein includes the transportation from the State of Washington to the State of Oregon.

If you find from the evidence, beyond a reasonable doubt, that the defendant, Rudolph LaMarr, did knowingly persuade and induce Enola McMath, named in Count I, to go from Seattle, Washington, to Portland, Oregon, with the intent and purpose of said Rudolph LaMarr that said Enola McMath, who at that time had not attained her eighteenth birthday, should engage in the practice of prostitution or debauchery whether with or without her consent, and did thereby knowingly cause the said Enola McMath to go and be carried as a passenger upon the route of a common carrier in interstate commerce from Seattle, Washington, to Portland, Oregon, then it is your duty to convict the said defendant.

If you find from the evidence, beyond a reasonable doubt, that the defendant, Rudolph LaMarr, did knowingly persuade and induce Beverly June Allen, named in Count II, to go from Seattle, Washington, to Portland, Oregon, with the intent

and purpose of said Rudolph LaMarr that said Beverly June Allen should engage in the practice of prostitution, debauchery or other immoral practice, and did thereby knowingly cause the said Beverly June Allen to go and be carried as a passenger upon the route of a common carrier in interstate commerce from Seattle, Washington, to Portland, Oregon, then it is your duty to convict the said defendant.

Instruction No. 5

The term “debauchery” means “vicious indulgence in sensual pleasures,” or “excessive indulgence in sensual pleasures of any kind”; “gluttony”; “intemperance”; “sexual immorality”; “unlawful indulgence of lust.”

3 Oxford English Dictionary.

3 Century Dict. Rev. Ed. 1477.

Caminetti v. United States

220F 545 (9 Cir.) 242 U. S. 470

Cleveland v. United States

(1946) 329 U. S. 15 (17)

Instruction No. 6

In order for you to convict the defendant of the charge contained in Count I of the Indictment, it is not necessary for the Government to prove nor for you to find that the defendant accomplished his purpose of having Enola McMath engage in prostitution or debauchery or other immoral acts at the end of the interstate journey, if you should find beyond a reasonable doubt, from all of the evidence, that that was the intent of the defendant prior to

the commencement of the interstate journey. It is sufficient if you find from the evidence, beyond a reasonable doubt, that defendant persuaded, induced, or coerced Enola McMath to go from Seattle, Washington, to Portland, Oregon, by common carrier for any one or more of those purposes, and it is your duty to convict the defendant.

Quallo v. United States

149 F(2) 891

Cleveland v. United States

(1946) 329 U. S. 15 (17)

It is requested that the Court give instructions on the following subjects:

7. Presumption of Innocence
8. Intent
9. Evidence
10. Reasonable Doubt
11. Credibility
12. Statements by Counsel
13. Conclusion

[Endorsed]: Filed October 17, 1950.

District Court of the United States, Western
District of Washington, Northern Division

No. 48115

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALI RASCHID, Named in the Indictment as
RUDOLPH LaMARR,

Defendant.

VERDICT

We, the Jury in the Above-Entitled Cause, Find the defendant Ali Raschid, named in the Indictment as Rudolph LaMarr, is guilty as charged in Count I of the Indictment; and further find the defendant Ali Raschid, named in the Indictment as Rudolph LaMarr, is guilty as charged in Count II of the Indictment.

/s/ CLARENCE G. BLEWETT,
Foreman.

[Endorsed]: Filed October 18, 1950.

[Title of District Court and Cause.]

**MOTION FOR ACQUITTAL AND IN THE
ALTERNATIVE FOR A NEW TRIAL**

Comes now the defendant and moves the Court for an Order of Acquittal as to each Count of the Indictment, upon the following grounds:

1. The evidence was insufficient to justify a verdict of guilt upon either Count of the Indictment.

2. The evidence was insufficient to justify the submission of either Count of the Indictment to the Jury.

3. The Government's evidence was insufficient to establish a *prima facie* case of guilt under either Count of the Indictment.

4. The Government's evidence established the innocence of the defendant as to each Count of the Indictment.

In the alternative, and in the event that the foregoing Motion for Acquittal be denied, the defendant moves the Court for an Order granting him a New Trial, upon the following grounds:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the Government's evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The defendant was substantially prejudiced and deprived of a fair trial by reason of the fact that the attorney for the Government, in his argument to the jury, called to the jury's attention that the defendant had not taken the stand in his own behalf by stating that certain evidence introduced by the Government had not been denied by the said defendant.

/s/ WILL G. BEARDSLEE,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 20, 1950.

United States District Court for the Western Dis-
trict of Washington, Office of Probation Officer

October 20, 1950

Via Airmail
Clerk of Court
Cook County,
Chicago, Illinois

Re: Rudolph LaMarr, true name Oscar Syl-
vester Williams or Ali Raschid
Case 49-S-9626

Dear Sir:

The above-named man claims that he had his name changed from Oscar Sylvester Williams to Ali Raschid sometime in July of 1949.

We would appreciate it if you would verify this

by making a notation on the lower part of this letter.

Enclosed is a self-addressed stamped envelope.

Thanking you for your cooperation in this matter, we are

Yours very truly,

/s/ ROBERT A. STEWART,
Chief U. S. Probation Officer.

Decree entered July 5, 1949, Judge Lupe.

Is above correct? Yes.

Dated and in which Court? Superior Court, Cook County, Illinois.

By /s/ S. DORN,
Deputy.

Received, Clerk of Court, Oct. 23, 1950.

Received, U. S. Probation Office, Oct. 30, 1950.

[Endorsed]: Filed Oct. 30, 1950.

United States District Court, Western District of
Washington, Northern Division

No. 48115

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALI RASCHID, Named in Indictment as
RUDOLPH LaMARR,

Defendant.

JUDGMENT, SENTENCE
AND COMMITMENT

On this 30th day of October, 1950, the attorney for the Government, and the defendant, Ali Raschid, appearing in person and being represented by Will G. Beardslee and Lynn J. Gemmill, his attorneys, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Counts I and II thereof; that the Probation Officer of this district has made a presentence investigation and report to the Court; now, therefore,

It Is Adjudged that the defendant, Ali Raschid, has been convicted by jury verdict and is guilty of the offense of violation of Sections 2422 and 2423, Title 18, U.S.C., as charged in Counts I and II of the Indictment, and the Court having asked the defendant whether he has anything to say why

judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged in Counts I and II of the indictment, and is convicted.

It Is Adjudged and Ordered that the defendant be committed to the custody of the Attorney General of the United States for confinement in the United States Penitentiary, McNeil Island, Washington, or such other like institution as the Attorney General of the United States or his authorized representative may by law designate for the period of Five (5) Years on each of Counts I and II of the indictment, provided, however, that the execution of the service of sentence on Count II shall run concurrently with, and not consecutively to, the service of the sentence imposed on Count I of the indictment, and further, that defendant pay a fine to the United States of America in the sum of One Thousand (\$1000.00) Dollars, with commitment until paid, on Count I of the indictment.

It Is Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done in Open Court this 30th day of October, 1950.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ JOHN E. BELCHER,
Asst. U. S. Attorney.

Violation of Sections 2423 and 2422, Title 18, U.S.C.
(White Slave Traffic Act)

[Endorsed]: Filed October 30, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant is: Rudolph La-Marr, Seattle, Wash.

Name and Address of Appellant's Attorney is: Will G. Beardslee, 1201 Northern Life Tower, Seattle 1, Washington.

The offenses with which Appellant was charged and convicted are:

Count I, knowingly and unlawfully persuaded, induced and enticed one Enola McMath, a female, under the age of eighteen years to go from Seattle, Washington, to Portland, Oregon, with the intent that she be induced to engage in prostitution and debauchery, all in violation of Section 2423, Title 18, U.S.C.

Count II, knowingly and unlawfully persuaded, induced and enticed Beverly June Allen, a female person, to go from Seattle, Washington, to Portland, Oregon, with the intent that she should engage in the practice of prostitution and debauchery and knowingly cause the said Beverly June Allen to go

and to be transported as a passenger upon a common carrier in interstate commerce from Seattle, Washington, to Portland, Oregon, all in violation of Section 2422, Title 18, U.S.C.

Order denying Appellant's Motion for Acquittal and in the alternative for a New Trial was signed and entered October 30, 1950.

Judgment of Conviction and sentence was signed and entered the 30th day of October, 1950, sentencing the Appellant to serve five years upon each Count, sentences to run concurrently, and to pay a fine of \$1000 upon Count I.

The Appellant is confined to the Federal jail at Seattle, Washington, pending the posting of Bail Bond on appeal in the sum of \$10,000.

I, the above-named Appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated this 2nd day of November, 1950.

/s/ WILL G. BEARDSLEE,
Attorney for Appellant.

[Endorsed]: Filed November 3, 1950.

[Title of District Court and Cause.]

WITHDRAWAL OF COUNSEL FOR
DEFENDANT AND APPELLANT

The undersigned hereby withdraws as attorney
for the defendant and appellant herein.

Dated this 3rd day of November, 1950.

/s/ WILL G. BEARDSLEE,
Attorney for Defendant and
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 4, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEARANCE

To: J. Charles Dennis, United States Attorney, and
to John E. Belcher, Assistant United States
Attorney:

You and Each of You Please Take Notice that
the undersigned, J. Kalina, hereby enters his ap-
pearance as attorney for the defendant, Rudolph
LaMarr in the above-entitled action.

/s/ J. KALINA,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 4, 1950.

RECOGNIZANCE OF DEFENDANT
ON APPEAL

United States of America,
Western District of Washington,
Northern Division—ss.

Know All Men by These Presents: That we, Ali Raschid, named in the indictment as Rudolph Lammarr, Principal, and the General Casualty Company of America, a corporation, as Surety, are held and firmly bound unto the United States of America in the full and just sum of Ten Thousand and No/100 (\$10,000.00) Dollars, to be paid to the United States of America to which payment well and truly to be paid, we bind ourselves and our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 3rd day of November, in the year of our Lord One Thousand Nine Hundred and Fifty.

Whereas, Lately at Seattle, Washington in the District Court of the United States for the Western District of Washington, in a suit pending in said court, between the United States of America, Plaintiff, and Ali Raschid, Defendant, a judgment and sentence was rendered against said defendant, Ali Raschid, and the said Ali Raschid has appealed to the United States Circuit of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit.

Now, the condition of the above obligation is such that if the said Ali Raschid named in the indict-

ment as Rudolph LaMarr shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause, in said Court, and shall prosecute his said appeal, and abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in the execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed, or the appeal is dismissed; and if he shall appear for trial in the District Court of the United States, for the Western District of Washington, such day or days as may be appointed for retrial by said District Court and abide by and obey all orders made by said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

/s/ ALI RASCHID,

GENERAL CASUALTY COM-
PANY OF AMERICA,

[Seal] By /s/ ANTHONY PANELLA,
Attorney-in-Fact.

Not good unless countersigned by F. Hugh Shaw.

/s/ F. HUGH SHAW.

Bond approved as to form:

/s/ JOHN E. BELCHER,
Asst. U. S. District Attorney.

Bond Approved this 4th day of November, 1950.

/s/ JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed November 4, 1950.

[Title of District Court and Cause.]

MOTION

Comes now the defendant, Ali Raschid, and moves the Honorable Court for an order granting leave to the defendant to leave the Western District of Washington for a period of ninety days.

This motion is based upon the affidavit hereunto annexed.

/s/ J. KALINA,
Attorney for Defendant and
Appellant.

Affidavit of Ali Raschid

United States of America,
State of Washington,
County of King—ss.

Ali Raschid being first duly sworn upon his oath, deposes and says: That he is the defendant and appellant in the above-entitled action; that he is en-

gaged in the business of selling jewelry; that he just received a shipment of jewelry from Los Angeles, and his business requires him to travel beyond the Western District of Washington in order to sell same.

Affiant further says that he desires to communicate personally with an attorney from the National Advancement Association for Colored People, either in the City of San Francisco, or in the City of Chicago, and be associated with J. Kalina, his attorney, in perfecting an appeal to the Circuit Court of Appeals for the Ninth Circuit.

/s/ ALI RASCHID.

Subscribed and sworn to before me this 6th day of November, 1950.

[Seal] /s/ JACOB KALINA,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed November 9, 1950.

[Title of Court and Cause.]

MOTION TO LEAVE JURISDICTION
DENIED

Now on this 9th day of November, 1950, Jacob Kalina appears for the Defendant Ali Raschid, named in the indictment as Robert LaMarr.

This cause comes on before the Court for hearing on defendant's motion to leave the jurisdiction of the Court. Motion is argued by Mr. Kalina, and denied, and it is so ordered. The defendant is present.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 48115

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALI RASCHID, Named in the Indictment as
RUDOLPH LaMARR,

Defendant.

Before: The Honorable John C. Bowen,
District Judge.

TRANSCRIPT OF PROCEEDINGS
AT TRIAL

October 17, 1950—10:00 o'Clock A.M.

Appearances:

Assistant United States Attorney John E.
Belcher appearing for plaintiff.

Will G. Beardslee and Lynn J. Gemmill appear-
ing for defendant.

Whereupon, a jury having been duly impanelled
and sworn and opening statement made by plaintiff,
the following proceedings were had and done,
to wit:

The Court: The plaintiff will now call its first
witness.

Mr. Belcher: If Your Honor please, if I may be permitted to call one witness out of order?

The Court: Is there any objection?

Mr. Beardslee: No, Your Honor, no objection. [2*]

MRS. CARRIE L. RUTHMAN

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher:

Q. Will you state your name, please?

A. Mrs. Carrie L. Ruthman.

Q. R-u-t-h-m-a-n? A. That is right.

Q. Where do you live?

A. 1033 Southwest Yamhill Street, Portland.

Q. Portland, Oregon? A. Yes, sir.

Q. What is your business?

A. I have been in the hotel business for many years.

Q. Were you in the hotel business in the month of May, 1950?

A. I was in the Carroll Hotel at that time, yes, sir.

Q. Did you bring with you at my request the records of registrations at your hotel concerning two girls? A. I did.

Q. Have you them with you, please?

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Mrs. Carrie L. Ruthman.)

A. Yes, sir. [3]

(Registration card marked Plaintiff's Exhibit 1 for identification.)

Q. You are now being handed what has been marked for identification Plaintiff's Exhibit 1. What is that?

A. That is the registration card of two young ladies. On registered as Clair Steven and the other as Germain Pica.

Q. What was the date of the registration?

A. June 25th.

Q. June 25th?

A. At six o'clock in the evening, yes, sir, 1950.

Q. What year? A. 1950.

Q. Do you see those two persons in the courtroom? A. Yes, I do.

Q. Do you recognize the two girls standing up as being those——

Mr. Beardslee: If Your Honor please, that is objected to as immaterial. If that is the date, we were not warned or advised of it in the indictment.

The Court: Will you state the materiality?

Mr. Belcher: Yes. I have to connect it up, if Your Honor please, with the testimony of the girls as to what the defendant told them to do. That is why I called the lady out of order. [4]

The Court: Do you promise to make such a connecting up?

Mr. Belcher: I do, Your Honor.

The Court: The objection is overruled. It is subject to the condition that it be connected up.

(Testimony of Mrs. Carrie L. Ruthman.)

Mr. Beardslee: May I suggest this, the information alleges that on or about May 15, 1950, they were transported, and counsel in his opening statement said he told them what hotel to go to and register. This witness testified, I believe, that they didn't come to Portland and register there until June 15, and the witness was refreshing her recollection from a registration card that counsel now seek to have introduced in evidence. Am I correct in that?

The Witness: It is May 15th.

Mr. Belcher: The charge in the information, if Your Honor please, is that this occurred on or about May 15th and I apprehend Your Honor will instruct the jury to the effect that the date is immaterial as long as it occurred within three years from the date of the return of the indictment.

The Court: Upon the promise stated by Mr. Belcher of connecting this up with the events charged in the indictment, the objection is overruled. I will ask Mr. Belcher and Mr. Beardslee to listen to the [5] witness' statement.

The Witness: It is May 25th.

The Court: What is the answer now of the witness? I do not know what has been heard. I wanted counsel to hear what the jury may have heard. That is what I had in mind. You may ask questions, because I do not understand what the witness intended to say.

(Testimony of Mrs. Carrie L. Ruthman.)

Q. Exhibit 1 for identification is your regular method of registering guests?

The Court: I think you should ask her.

Q. What is it, Exhibit 1?

A. Exhibit 1 is a registration card that we use continuously at our hotel desk.

Q. What was the first date that these two persons were registered at the Carroll Hotel, which is run by you?

A. On May 25, 1950, at six p.m.

Mr. Belcher: I now offer Exhibit 1.

Mr. Beardslee: I do not believe it is competent at this time. It may be when counsel picks it up later. He may be able to connect it.

Mr. Belcher: I will withdraw the offer at this time. She has identified it.

The Court: Do you wish to ask here any other questions?

Mr. Belcher: Nothing further, Your Honor. [6]

The Court: You may cross-examine.

Cross-Examination

By Mr. Beardslee:

Q. You are, Mrs. Ruthman, testifying from the exhibit about dates, rather than from your own recollection?

A. Well, I remember very well of those ladies being at my hotel on account of the unpleasant circumstances and also——

The Court: Do not volunteer any reasons why. Just answer the question.

(Testimony of Mrs. Carrie L. Ruthman.)

The Witness: I am testifying according to my card.

Q. In other words, you have had so many guests through the hotel that you haven't an independent recollection of the dates that they registered there? That is approximately correct, isn't it?

A. From memory, I couldn't swear to it. I am going by the card.

Q. When you first testified June 15th, you had merely misread your card?

A. That's right.

Q. Is that card signed by the girls or is that merely your hotel record that your clerk or someone has made out? [7]

A. Mrs. Elliott signed. She witnessed the card.

Q. One of the girls did?

A. My evening clerk.

Q. Did the girls sign it? Did the girls sign the card?

A. Each of them signed the card, yes.

Q. Is that their signature on the card?

A. Yes.

Mr. Beardslee: I have no further questions.

The Court: You may step down.

Mr. Belcher: I would ask, unless there is objection on the part of counsel or the Court, that the witness may be excused.

The Court: I think you had better leave the witness here, in view of the fact that the exhibit is not in evidence. Some other question may arise later in

connection with it. The Court might wish to ask a question.

ENOLA McMATH

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [8]

Direct Examination

By Mr. Belcher:

Q. Will you state your name, please?

A. Enola Rae McMath.

Q. How old were you in the month of May, 1950?

A. Sixteen.

Q. Had you been previously married?

A. Yes, I was married when I was fourteen.

Q. Was that with the consent of your parents?

A. Yes, it was.

Q. Are you the mother of a child?

A. Yes, I have a little girl.

Q. How old?

A. Nineteen months.

Q. I will ask you if you are acquainted with the defendant, Rudolph LaMarr, who claims his name to be Ali Raschid?

A. Yes, I am.

Q. When and where did you first meet him?

A. The first time I met him was at the Sessions Club in Seattle. That was the first time that I had seen him, and I was introduced to him by my sister, Beverly.

Q. Where is the Sessions Club?

A. It is on Fourteenth and Main.

Q. Fourteenth and Main in the city of Seattle?

(Testimony of Enola McMath.)

A. Yes.

Q. What kind of a club is it?

A. It is a colored club.

Q. Do you know the date that you first met the defendant?

A. I don't remember the exact date.

Q. Was it during 1950? A. Yes, it was.

Q. Do you know whether it was in April or May of that year?

A. I wouldn't swear to it, but I believe it was in May.

Q. Were you introduced to the defendant by somebody?

A. I was introduced to him by my sister, Beverly.

Q. What name was given to you as the name of the defendant?

A. Well, just Ali was the name I was introduced to him.

Q. Did you know him by any other name?

A. Not at that time.

Q. At any time afterwards?

A. Yes, later I found out that he went by the name Rudy LaMarr.

Q. On the occasion that you met the defendant at the Sessions Club, did he make any kind of a proposition to you? [10] A. No, he did not.

Q. Did you meet him at some subsequent date?

A. Several. Well, it was weeks or so later that my sister and I were up at the Elks Club and it was then that——

(Testimony of Enola McMath.)

Q. You say the Elks Club? Is that the Elks Club down here on——

A. Jackson.

Q. It is the colored Elks Club? A. Yes.

The Court: Ask the witness, Mr. Belcher.

The Witness: It was the colored Elks Club on Jackson street.

Q. What was the occasion of your going down there?

A. Well, he had called us on the phone and said he wanted to talk to us and so we both went down, and it was then that he brought the subject up of going to Portland. I was working at the time, I was working, that was it, and I was planning on changing my job and he had said there were more opportunities for work down there.

Q. Where at this time were you working, if at all? A. At the Park Cafe on Third Avenue.

Q. What was your occupation?

A. Waitress.

Q. On the occasion that he wanted you to go to [11] Portland, did he say for what purpose?

A. He didn't mention any purpose, just that he thought we would like it down there.

Q. Was your sister present at the time of this conversation? A. Yes, she was.

Q. Then what followed?

A. Well, then after we had decided to go, he told us that we could meet him the next day and that he would give us the money for the train fare, for the tickets.

(Testimony of Enola McMath.)

Q. Did he give you money for train fare?

A. Yes.

Q. Where? A. It was in the train depot.

Q. What did you do with that money?

A. I took the money and bought Beverly and myself two tickets round trip, and then when I arrived in Portland used the other part of the money for our hotel.

Q. What, if anything, was said to you by the defendant at the station or at any other time as to where you should go or what you should do at Portland?

A. Before we left, he had told us that after we had registered at the hotel, to call him.

Q. What hotel? Did he suggest the name of the hotel?

A. He had given us, I believe it was two hotels to [12] choose from. The Carroll was one and I don't remember the other, and we chose the Carroll Hotel.

Q. After you arrived, did you register at the hotel? A. Yes, we registered at the Carroll.

Q. You are now being handed what has been marked for identification Plaintiff's Exhibit 1. Did you ever see that before?

A. Yes, that is my signature.

Q. What is your signature?

A. Clair Steven.

Q. Why did you use an assumed name?

A. Well, the reason for it—I don't really have

(Testimony of Enola McMath.)

any. We just decided it would be better if we used fictitious names.

Q. You identify that signature on that card as having been made by you? A. Yes.

Q. Does the card itself indicate to you the date on which you registered? A. Yes.

Q. What was it?

A. It was May 15th, or 8th, I believe it was May 8th.

Q. Was the other signature that appears upon that card made in your presence?

A. Yes. [13]

Q. By whom? A. By my sister.

Q. What name did she register under?

A. Germain Pica.

Mr. Belcher: I now offer Exhibit 1.

Mr. Beardslee: I think it may be admissible this time, Your Honor, but I have some serious doubt about its materiality. It might be prejudicial.

The Court: Plaintiff's Exhibit 1 is now admitted, the objections thereto being overruled.

(Plaintiff's Exhibit 1 received in evidence.)

Q. After you had registered at the Carroll Hotel, did the defendant contact you?

A. No, we contacted him.

Q. You contacted him? A. Yes.

Q. Where did you contact him?

A. Well, I don't remember the number. It was at his home in Portland, I gathered.

(Testimony of Enola McMath.)

Q. By telephone, was it? A. Yes.

Q. Did the defendant thereafter telephone you at your hotel? [14]

A. Not the same day, but he did call.

Mr. Beardslee: I might suggest, if Your Honor please, I think I have been quite lenient in not objecting to leading questions, but these have been constantly leading.

The Court: The objection is well taken. Avoid leading.

Q. What happened after the defendant contacted you and you contacted him by telephone?

A. The day that we arrived in Portland, after I contacted him, he gave us this name of this club where we could meet him, and that was McLeod's, I think.

The Court: State the name again.

The Witness: I believe it was McLeod's Club, I am not sure how to pronounce it. We met him there and I don't remember if it was that evening or the next evening when we saw him again, but we met him there and talked to him and told him where we were staying.

Q. Did you meet him at a subsequent date?

A. Yes, it was that evening or the next day, I don't remember which it was, that we did see him.

Q. Where did you meet him?

A. At this club, McLeod's.

Q. What did you do at the club? [15]

A. We didn't do anything. We sat there and talked with him and that was about all.

(Testimony of Enola McMath.)

Q. Did you meet him after that again?

A. Yes, at the same place, and that time, the second time——

Mr. Beardslee: I believe, if Your Honor please, the question has been answered.

Q. Did you have any conversation with him at that time?

Mr. Beardslee: Counsel's question has been answered.

The Court: Read the question.

(Last question read by reporter.)

The Court: State yes or no.

The Witness: Yes.

Q. Where? A. At the McLeod's Club.

Q. Did you have a conversation with him at that time? A. Yes.

Q. What was the gist of that conversation?

A. Well, as much as I can remember, we were talking about working and he asked us if we had looked for any jobs. We had looked for a couple and something had come up where they had been taken, and we hadn't found any, and he asked [16] us if we had enough money and at that time we had enough and——

Q. Then you did meet him at a subsequent time to that?

A. Yes. One afternoon by myself I went down to this hotel where he had this room and that was before I came back to Seattle the second time.

Q. Where did you meet him?

(Testimony of Enola McMath.)

A. At the Rowland Hotel.

Q. What, if anything, occurred at the Rowland Hotel between you and the defendant?

Mr. Beardslee: Objected to as immaterial, if Your Honor please, not properly connected up with the issues of this case.

The Court: Overruled.

The Witness: The thing that occurred, we had sexual intercourse.

Q. At the Rowland Hotel? A. Yes.

Q. What were the circumstances under which you had sexual relations?

Mr. Beardslee: If Your Honor please, I fail to see any materiality of that. It might elicit prejudicial answers that I cannot possibly foresee. I do not know what the materiality the nature of the intercourse might be.

The Court: Any response to the objection?

Mr. Belcher: Yes, Your Honor. It goes right to the gist of this crime.

The Court: I do not know what it is that you seek to show and if you feel it is not appropriate to mention what it is, I will have to discharge the jury until I find out what it is. The jury will temporarily retire to the jury room.

(Jury retires.)

Mr. Belcher: I want to prove by the witness, if Your Honor please, that it was because of intimidations and threats that she gave up her body to this defendant on that occasion, and that is de-

(Testimony of Enola McMath.)

bauchery. That is what he was charged with, with debauching this girl. That is the gist of the charge.

Mr. Beardslee: Then I am sorry, Your Honor, but I did not understand counsel's question.

The Court: Read the question.

(Last question read by reporter.)

The Court: Is there anything else to be said before calling in the jury?

Mr. Belcher: Nothing further.

Mr. Beardslee: No, Your Honor.

The Court: Bring in the jury. [18]

(Jury returns.)

The Court: All of the jurors have returned to their places as before. Read the question.

(Last question read by reporter.)

The Court: You may answer the question.

The Witness: Well, the reason for having sexual intercourse was before I had gone to Portland that I didn't mention was that——

The Court: Never mind that. Do not state that. That is not in this question. Read the question.

(Last question read by reporter.)

The Court: Answer that and nothing else.

The Witness: I was afraid.

Q. Why? Was it something that he said?

A. Well, he had said something before that.

Q. What was it he said?

(Testimony of Enola McMath.)

A. That is what I started to say, before the time that I had left Seattle, he had called the house and wanted to see me. He said that he would come down to work and pick me up, that he wanted to talk to me, and I said no, that I didn't want to see him. He said that if I had any plans to see anyone else or had made plans, just to forget about them, and if I didn't see him he would come in and make a scene and drag me out of there. He didn't mean bodily, I don't imagine, but I thought he would create a [19] scene, so I didn't go to work that day.

Q. Was there more than one occasion upon which you had sexual relations with the defendant in Portland?

A. Just this one occasion at the Rowland Hotel. What I meant was the first occasion was at the Rowland Hotel that afternoon, and the second occasion was one evening after we had been to the club, we went there. The next day was when I was leaving for Seattle and I had asked Rudy for some money. I had told him that I needed some money and he had given it to me.

Q. Did he give you some money? A. Yes.

Q. How much? A. \$70.00.

Mr. Belcher: You may inquire.

Cross-Examination

Q. I believe you said you first met the defendant at the Sessions Club? A. That is correct.

(Testimony of Enola McMath.)

Q. And were introduced at that time by your sister? A. Yes.

Q. Had you ever seen the defendant before you met him at the Sessions Club?

A. No, I had never seen him but he had called the [20] house and I had talked to him on the telephone.

Q. For how long a period of time before you met him at the Sessions Club had you talked to him over the telephone? Was it once or twice, a dozen times, how long a period of time?

A. I talked to him, I guess, two or three times over the telephone, and I guess it had been about three weeks or so.

Q. Three weeks? A. Yes.

Q. Did you go down to the Sessions Club to meet him or——

A. No. I didn't go down there with intentions of meeting him but he was there.

Q. You went down there to have a good time, did you not? A. Yes.

Q. And you had been going down to the Sessions Club for more than a year? A. No.

Q. How long?

A. Well, I had only been in the place half a dozen times.

Q. Half a dozen times during what period of time had you been in the Sessions Club? [21]

A. When I first started going there, I was always with someone or in a crowd.

(Testimony of Enola McMath.)

Q. Colored people or white people?

A. White people.

Q. This that you have described as a Negro night club is really a drinking club where they serve liquor and all? A. Yes.

Q. And you at the time you were going there were only seventeen years of age? A. Yes.

Q. Were you intoxicated at the time you met the defendant? A. No.

Q. Had you been on the other occasions when you were down there? A. No.

Q. What entertainment do they have at that club besides liquor? A. Dancing.

Q. Just explain what you mean when you say it was a colored night club?

A. It was owned and managed by colored people.

Q. And most of the patrons were colored people, were they? [22] A. The majority.

Q. You had been dancing with them before you met the defendant? A. No, I hadn't.

Q. During the probably six times as you recall it that you had been going down there before you met LaMarr, you had not been dancing with the patrons there? A. No, I hadn't.

Q. But yet that was your purpose for going down, was to dance, isn't that true?

A. I said before that the majority of times I had gone I was in a crowd or with someone.

Q. You mentioned being afraid of the defendant. Were you afraid here at Seattle?

(Testimony of Enola McMath.)

A. Yes, I was.

Q. Were you afraid he would harm you?

A. Yes.

Q. Where else besides the Negro Elks Club and the Sessions Club have you ever seen or met the defendant?

A. The Elks and the Sessions, that's all.

Q. Did the defendant ever threaten to harm you physically on either of the times you met him here in Seattle?

A. Only the time that he called on the phone.

Q. When you met him in the Negro Elks Club, there were [23] all colored people there, weren't there?

A. There was no one there except just a couple of people besides ourselves.

Q. They were colored?

A. Yes, they were the owners and the people that work there.

Q. But he didn't offer you any threats or bodily harm then, did he? A. No.

Q. When you met him in the Sessions Club, there were about two-thirds colored people?

A. Well it was about half and half.

Q. And he did not offer to do you any bodily harm there?

A. At one occasion, not that he mentioned bodily harm, but he—I wasn't with him at the time, I was with——

Q. I am speaking of this occasion when you first met him at the Sessions Club. He didn't threaten

(Testimony of Enola McMath.)

you, did he? A. Not the first occasion, no.

Q. Are you sure it was the Colored Elks Club where you met him on the second occasion?

A. The second time I saw him was at the Sessions.

Q. So the only time that he ever threatened you was over the telephone, is that correct?

A. No. One evening we were down at the Sessions and [24] I wasn't in his company, I was with some other people, and he wanted me to leave there with him. I said no, and he wanted me to meet him outside or something, but he didn't threaten me.

Q. Don't they have a police door man at the Sessions Club? A. Not that I can remember.

Q. They have a police matron in there?

A. I don't know.

Q. Don't they have police—haven't they had police in there every evening that you have been in there? A. Yes.

Q. Did you ever go to any of the police and tell them that he had threatened you with bodily harm?

A. At that time he hadn't threatened me with bodily harm.

Q. The second time that you saw him in the Sessions Club when you say he did threaten you, there were police there then, weren't there?

A. I don't remember.

Q. Do you recall ever having been in that club when they didn't have from one to two uniformed policemen in there? A. Yes.

(Testimony of Enola McMath.)

Q. Was that before or after you met LaMarr?

A. Before and after.

Q. And you weren't afraid of policemen, were you?

A. No.

Q. You knew that that is why we have policemen, to protect people from someone they are afraid of, don't you?

A. Well, I couldn't very well go up to a policeman and tell him I was afraid of the man if I didn't have any—like I said, he hadn't ever threatened me bodily, with bodily harm, down at the club when I saw him there.

Q. When and where did he first threaten you?

A. Over the telephone.

Q. And that was here in Seattle?

A. Yes.

Q. It was after that that you accepted this money to go to Portland?

A. Yes, that was after I had talked to him, I had seen him and talked to him in the Elks Club.

Q. Were you afraid of him at the time you accepted this money to go to Portland?

A. No.

Q. Did you leave the same day you accepted his money?

A. Yes.

Q. So the threats you say he had over the phone in Seattle didn't frighten you at all, is that true?

A. They frightened me at the time, yes.

Q. But then you got over your fear, is that right?

A. Well, I did for a short time, yes.

Q. You weren't afraid to accept money from him at the time you went to Portland, were you?

A. I wasn't afraid of him at that time, no.

(Testimony of Enola McMath.)

Q. But during the interim from the time you met him until the time you left to go to Portland, you had off and on or intermittently been frightened of him, is that correct? A. Yes.

Q. How long had you been in Portland when you went to him to borrow the—I believe you said \$75? A. \$70.

Q. How long had you been in Portland at that time? A. It was a week or so, I believe.

Q. And had you been in Portland continuously during that week or so? A. Yes.

Q. Didn't you tell him you wanted to borrow the money so you could come back to Seattle?

A. Well, I didn't actually ask him for the money. I told him I had some things I had to pay and he asked me how much I needed and I told him how much and he said I could have it.

Q. Isn't it true, youngster, that you told him that [27] you couldn't find work that you wanted in Portland and you wanted to come back to Seattle, and asked him for money so that you and your sister could return to Seattle? A. No.

Q. You told him you wanted to pay up your hotel bill or wherever you were living, didn't you?

A. No.

Q. Did you mention returning to Seattle at the time you borrowed that money?

A. That was the main reason for borrowing it. I told him I had to come back to pay my baby's board and a few other things I had to pay.

Q. Were you afraid of him after you registered

(Testimony of Enola McMath.)

in this hotel in Portland and called him up to let him know where you were staying? A. No.

Q. He never came down to that hotel to see you, did he? A. No.

Q. As far as you know, he was never in that hotel, was he? A. In which hotel?

Q. The hotel where you were staying, where you told him you were staying.

A. Not to my knowledge, no. [28]

Q. So in order to see him, you phoned and asked him where you could see him, didn't you?

A. He told us where we could meet him.

Q. Yes, but that is after you phoned him to tell him where you were, isn't it? A. Yes.

Q. And the reason you wanted to see him then was to obtain some more money from him, wasn't it? A. No.

Q. Weren't you running a little bit short at the time you phoned him?

A. The first time I phoned him was when we first got in town and I still had some of the money left.

Q. Did you ask him for some money when you met him up at this club? A. No.

Q. He didn't tell you to come to his place of residence to meet him, did he?

A. One time he asked me to come over. He was going to dye my hair.

Q. He was going to dye your hair?

A. Yes.

(Testimony of Enola McMath.)

Q. Did he? A. Yes.

Q. And it turned out green, didn't it, in color?

A. Yes.

Q. You didn't like that very much, did you?

A. No.

Q. You were quite angry with him because in dying your hair he turned it out a green color, weren't you? A. Yes.

Q. And after his incompetent attempt at dying your hair, he again gave you some money so that you could go to some beauty parlor and have the green color taken out, didn't he? A. Yes.

Q. When did you come back to Seattle from your sojourn in Portland?

A. It was about a week after we had been in Portland.

Q. Did you come to Seattle, or did you go down to San Francisco? A. I came to Seattle.

Q. Did you go to San Francisco during your absence? A. No.

Q. Did you go to Sacramento? A. No.

Q. Did you go anywhere except to Portland?

A. I came from Portland, I came directly to Seattle.

Q. But when you went down to Portland, you said you registered May 8th. Exhibit 1, as it was read by the [30] landlady of the hotel, said you registered May 25th.

A. I don't remember the date. If that is what the card said, that is the day I registered.

Q. You were looking at the card, Exhibit 1,

(Testimony of Enola McMath.)

when you said it was May 8th. Do you want to look at it again?

A. I can see now what it was.

Q. Is it May 8th or the 25th?

A. The 25th.

Q. From the time you left Seattle, May 25th, until the time you returned to Seattle, were you anywhere else except in Portland, Oregon?

A. No.

Q. Did you tell the defendant that you were going anywhere else? A. No.

Q. Didn't you tell him you were going to Seaside?

A. Oh, we did go to Seaside, but I didn't tell the defendant we were going.

Q. What?

A. I didn't tell Rudy that we were going.

Q. When was it that the defendant, Rudy, as you call him, asked you if you were working? Was that the first time you saw him in Portland or the second time?

A. It was the second time, I believe.

Q. You told him you wanted to go down there to find [31] employment, didn't you?

A. Yes.

Q. And you never suggested to him at any time that you wanted to go down there to practice prostitution, did you? A. No.

Q. You said you wanted to go down to engage in legitimate work, isn't that true? A. Yes.

Q. It was on that promise of yours, or at least it was upon that assertion of your intention that

(Testimony of Enola McMath.)

he loaned you and your sister the 30 or 35 dollars to go to Portland, is that correct?

A. I guess so.

Q. You have never given the defendant, Rudy LaMarr, any money, have you? A. No.

Q. You haven't even repaid him or attempted to repay him for the money that he advanced you?

A. No, because it wasn't considered a loan.

Q. What did you consider it as?

A. He told me at the time that I wouldn't have to worry about the money.

Q. That is after you had been asking him for money, telling him that you hadn't been able to find a job, isn't [32] that true?

A. I never asked him for money.

Q. Perhaps I don't hear you as well as I should. I thought you testified a while ago you went to him and told him you would like to have some money to pay some bills and he gave you \$70, is that correct?

A. I told him the money I needed. I didn't ask him for it. He offered it to me.

Q. You said you had intercourse with him in Portland through intimidation and fear? You were frightened of him? A. Yes.

Q. You recall testifying to that, don't you?

A. Yes.

Q. And it was after that that you went to see him and asked him for the \$70, wasn't it?

A. That was when he gave me the money, yes.

(Testimony of Enola McMath.)

Q. That was some days after this alleged intercourse took place? A. It was the next day.

Q. You weren't afraid of him then, were you? I will withdraw that question. You weren't afraid of him enough to neglect to ask him for money, were you?

A. But I didn't ask him for the money.

Q. Well, you weren't sufficiently afraid of him that [33] you were hesitant to look him up and tell him you needed money to pay some bills with, were you?

A. I had no intentions of asking him for the money when I went up there.

Q. You just figured, I presume, that he would be kind hearted enough to give you the \$70 to pay your bills, is that correct?

A. I didn't expect him to offer it, either.

Q. You did or didn't?

A. He asked me at the time if anything was troubling me and I told him yes it was, and he asked what it was, and I told him, and it was then he offered me the money.

Q. Did you receive money from anyone else in Portland? A. No.

Q. Did you pay your bills in Portland before you came back to Seattle?

A. I had no bills.

Q. Your room rent and all was paid up?

A. Yes.

Q. Do you know a William Kirk?

A. Yes.

(Testimony of Enola McMath.)

Q. Did you get any money from him in Portland? A. No. [34]

Q. Did you obtain anything from him in Portland? A. No.

Q. Who paid your bill at the Washington Hotel? A. I did.

Q. Did you at any time while you were down in Portland go to work? A. No.

Q. By the way, these fictitious names you used at the hotel, that was your own idea, was it not, that is you and your sister?

A. I don't remember.

Q. I mean by that, you thought up the names?

A. Yes.

Mr. Beardslee: I do not believe, Your Honor, I have any other questions of this witness.

The Court: Have you finished with this witness?

Mr. Belcher: Yes, Your Honor.

The Court: The witness is excused from the stand.

(Witness excused.)

BEVERLY JUNE ALLEN

called as a witness by and on behalf of plaintiff,
having been first duly sworn, was examined and
testified as follows:

Direct Examination

By Mr. Belcher:

Q. Will you state your name, please.

A. Beverly June Allen.

Q. Where do you live?

A. 1323 East Pine.

Q. How old are you? A. Nineteen.

Q. How old were you in May, 1950?

A. Eighteen.

Q. Are you acquainted with the defendant in
this case, Rudolph LaMarr? A. Yes.

Q. By what name did you know him?

A. Ali Raschid.

Q. When, if at all, did you learn that his name
was Rudolph LaMarr?

A. Oh, around a week after I knew him or I
met him.

Q. At the time you met him?

A. Yes.

Q. Under what circumstances did you meet him?

A. Well, I was at the club one night——

Q. What club?

A. The Sessions Playhouse, and the waitress
brought over a note from Rudy asking to meet me.

Q. Do you have that note? A. No.

Q. Then what happened? A. Nothing.

(Testimony of Beverly June Allen.)

Q. Did you do anything about the note?

A. Not at first.

Q. Did somebody introduce you to him?

A. Yes.

Q. By what name was he introduced to you?

A. Ali Raschid.

Q. Was anything said in his presence by the person that introduced you as to what, if any, occupation he had? A. No.

Q. Did he ever tell you what his occupation was?

Mr. Beardslee: Objected to, if Your Honor please, as immaterial.

The Court: Overruled.

Q. Answer the question.

A. I believe he was a mental physician.

Mr. Beardslee: I move the answer be stricken, based upon a conclusion. The witness said, "I believe he was."

The Witness: Well, he did say——

The Court: The objection is overruled. The motion is denied. [37]

Q. Do you remember what month of the year it was that you first met him?

A. May, I believe.

Q. After you first met the defendant, what if any conversation did you have with him about prostitution?

A. Well, there wasn't any to begin with, at first.

Q. Well, was there at any time? A. Yes.

(Testimony of Beverly June Allen.)

Q. When?

A. It was one night in the club.

Q. What club?

A. Sessions Playhouse.

Q. In what month of the year?

A. I really couldn't tell you.

Q. What was the conversation? What did he say to you?

The Court: You should fix the year or fix the month or fix the time.

Q. What was the month and the year?

A. In May.

Q. Of what year? A. 1950.

Q. What was the conversation? What did he say to you?

A. Well, he just wanted to know if I wanted to become a prostitute. [38]

Q. What did you tell him? A. No.

Q. Did you meet him at some subsequent date, later date in May?

A. Not that I can remember.

Q. Did you ever meet him at the Elks Club?

A. Only once.

Q. When was that?

A. That was the day before my sister and I left for Portland.

Q. Did you have any conversation with him at that time, I mean the defendant?

A. About prostitution you mean?

Q. Yes. A. No.

(Testimony of Beverly June Allen.)

Q. What was said? What kind of a conversation did you have?

A. Well, we were just going up there to look for work.

Q. Going where? A. To Portland.

Q. Did he say Portland? A. Yes.

Q. What was your answer?

A. Well, I would go if my sister would go. [39]

Q. Did you go to Portland? A. Yes.

Q. Did the defendant accompany you to Portland? A. Yes.

Q. Did you travel together? A. No.

Q. Was anything said by him to you about your not traveling together?

A. Well, he thought it would be best for him to ride in a different coach.

Q. Did he say why?

A. Not to me, that I can remember, no.

Q. Did you see your sister purchase the tickets?

A. Yes.

Mr. Beardslee: I think, if Your Honor please, these questions are getting very leading. I will have to object.

The Court: The last question is leading. Sustained.

Q. What transpired the next day after this conversation that you speak of?

Mr. Beardslee: If your Honor please, that is highly improper, what transpired. It is assuming something not in evidence. I think counsel is entitled to ask, did anything transpire. [40]

(Testimony of Beverly June Allen.)

The Court: The objection is sustained.

Q. What, if anything, was done by you and the defendant in this case on the day following that conversation that you have just related?

A. Well, we just met him at the train depot, train station.

Q. What train depot?

A. I don't remember the name of it.

Q. Well, don't you know whether it was the Union Depot or Great Northern, Northern Pacific or what depot it was in Seattle?

A. Yes, I believe it was the Great Northern.

Q. What happened there?

A. Well, my sister got the money from him and she bought the tickets.

Q. How many tickets did she buy?

A. Two.

Q. Did you go to Portland? A. Yes.

Q. What, if anything, was said to you by the defendant as to what hotel, if any, that you should go to in Portland?

A. He told us to go to the Carroll Hotel.

Q. What, if anything, further did he say about after you got to the Carroll Hotel? [41]

A. I didn't speak to him after that.

Q. Did you go to the Carroll Hotel?

A. Yes.

Q. You have now been handed what has been marked Exhibit 1. Did you ever see that card before? A. Yes.

Q. Where? A. At the Carroll Hotel.

(Testimony of Beverly June Allen.)

Q. Where? In what place?

A. In Portland, Oregon.

Q. What was the occasion on which you saw it?

A. Well, we were registering at the hotel.

Q. Does your signature or your handwriting appear on there? A. Yes.

Q. Under what name? A. Germain Pica.

Q. That was not your name? A. No.

Q. Did you meet the defendant at any time after you arrived at Portland, at the Carroll Hotel?

A. Yes, we met him at the McLeod's Club.

Q. Where, in Portland? A. Yes.

Q. What, if any, conversation took place between you [42] and the defendant at that time?

A. There was none.

Q. What?

A. There wasn't any conversation, not that night.

Q. What did you do at the club?

A. Pardon?

Q. What did you do at the club?

A. Well, I just sat and I danced.

Q. Sat and danced? A. Yes.

Q. Did you at any subsequent time, later time, have any conversation with the defendant about prostitution?

Mr. Beardslee: If Your Honor please, that is highly leading and suggestive.

The Court: Objection sustained.

Q. Did you have any later conversation with the defendant? A. Yes, at his place.

(Testimony of Beverly June Allen.)

Q. Where was his place?

A. I couldn't tell you the address. It was in Portland.

Q. When you say his place, do you mean the hotel in which he was living?

A. No, it was his home.

Q. When was that? [43]

A. When was that?

Q. When was that?

A. I couldn't tell you the date.

Q. What month and year?

A. It was in June.

Q. What? A. June.

Q. June of what year? A. 1950.

Q. What was the conversation?

A. Well, he just wanted to know if I wanted to become a prostitute.

Q. And what did you say? A. No.

Q. Did you become a prostitute? A. No.

Mr. Belcher: I think you may inquire.

Cross Examination

By Mr. Beardslee:

Q. What type of club was this where you met the defendant in Portland?

Mr. Belcher: Pardon me, may I——

The Court: Yes, if there is something else that is material. [44]

(Testimony of Beverly June Allen.)

Direct Examination
(Continued)

By Mr. Belcher:

Q. Directing your attention to last Friday, the month of October, did you see the defendant?

A. Friday? No.

Q. Did you see him at any time prior to this trial? A. I saw him Sunday night.

Q. Where?

Mr. Beardslee: That is objected to as immaterial, if Your Honor please.

The Court: What is the purpose?

Mr. Belcher: The purpose is to show the conversation that he had with her concerning this trial.

The Court: The objection is overruled.

Q. Did you have a conversation with the defendant at that time? A. Yes.

Q. What did he say to you?

A. Well, he was talking about the trial and he was in a round about way trying to tell me how I would tell——

Mr. Beardslee: Just a minute, a round about way, he was trying to, I think the witness should be confined.

The Court: The objection is sustained. It is [45] permissible for you to say in substance what he said. If you can recall his words, you should state his words. If you cannot recall the exact words, it is permissible for you to state the substance of what he said.

The Witness: Well, he was telling me how I

(Testimony of Beverly June Allen.)

could—well, I don't know how to put the words.

Q. In substance, what did he say to you?

A. Well, to deny everything that I had said before.

Q. Did you tell him that you had been interviewed by special agents of the Federal Bureau of Investigation? A. No.

Q. What was it he wanted you to deny?

A. He didn't want me to—he was just bringing it up, I mean.

Q. What?

A. He was trying to tell me if I——

Mr. Beardslee: If Your Honor please——

The Court: You will have to say what he said or the substance and effect of what he said, if you say anything with reference to the conversation. Read the last question.

(Last question read by reporter.)

The Witness: Everything that I have said before——[46]

Q. To whom? A. To the F.B.I. man.

Q. What else did he say?

A. That's all.

Mr. Belcher: You may inquire.

Cross-Examination

By Mr. Beardslee:

Q. Did he accuse you of having been lying?

A. No.

Q. Didn't he say you had lied about him?

(Testimony of Beverly June Allen.)

A. He just told me that he didn't want me to lie.

Q. As a matter of fact, he didn't talk to you at all, did he? A. He did.

Q. Sunday night? A. Yes, he did.

Q. Was anyone else present?

A. There was a friend of mine.

Q. A friend of yours? A. Yes.

Q. Did your friend take part in the conversation? A. No.

Q. Was he there where he could hear everything that was said? [47] A. No.

Q. I presume it was a man?

A. It was a she.

Q. Colored or white girl? A. White.

Q. What was her name?

A. Her name is Pat.

Q. Pat what?

A. I don't know her last name.

Q. What does she do? A. I have no idea.

Q. You say that she is a friend of yours, that you do not know or have any idea what she does?

A. I only met her a few days ago, a week ago.

Q. Where did this occur?

A. My meeting her?

Q. This conversation you are referring to, where did it occur?

A. In the Elks Club, I mean below the Elks, in the restaurant.

Q. The colored Elks? A. Yes.

Q. You are not working there, are you?

(Testimony of Beverly June Allen.)

A. No.

Q. Was he in the restaurant, that is, the defendant [48] when you came in, or were you there when he came in?

A. I was there when he came in.

Q. Were you and this friend, Pat, having dinner together or lunch or something?

A. We were having coffee.

Q. At what hour again was this?

A. Around 10:30 or 11:00.

Q. At night? A. Yes.

Q. I don't know whether you testified that you had children. Have you? A. Yes.

Q. How old are they?

A. My little boy is a year and ten months.

Q. What is your occupation?

A. I have no work now.

Q. How long since you had work?

A. Well, I was married before so I didn't have to work.

Q. Are you divorced? A. Yes.

Q. When were you divorced?

A. Well, my divorce will be final in a couple of months.

Q. Your divorce will be final in a couple of months? [49] A. Yes.

Q. When did you have your trial?

A. I wasn't present at the trial.

Q. Your husband divorced you, then?

A. Yes.

Q. Did that happen here in Seattle?

(Testimony of Beverly June Allen.)

A. No.

Q. Where? A. In California.

Q. Are your children here or in California?

A. My child is with my husband.

Q. In California? A. Yes.

Q. How long has he been in California?

A. He has lived there all his life.

Q. Were you living with your husband together?

A. No.

Q. When did you leave him in California?

A. Around seven months ago.

Q. Then did you come directly up to Seattle?

A. Yes.

Q. When you were in Portland on this occasion in May or June, I believe you have it, did you go down to California then? A. No. [50]

Q. Did you go anywhere except to Portland?

A. I just went to Portland.

Q. Did you look for any work there?

A. Yes.

Q. You told Rudy LaMarr when you left that you were going down there to look for legitimate work, didn't you? A. Yes.

Q. You didn't tell him at the time he gave your sister this 30 or 35 dollars that you were going to look for work as a prostitute, did you?

A. No.

Q. As a matter of fact, you didn't look for work as a prostitute there, is that correct?

A. No, I didn't.

Q. You did testify on direct examination, if I

(Testimony of Beverly June Allen.)

recall correctly, that the first time you met Rudy LaMarr, the defendant in this case, he asked you if you wanted to be a prostitute?

A. The first time?

Q. Yes. A. Yes.

Q. Then you met him several times after that at the Sessions Club, did you, or not?

A. Yes. I didn't meet him, I had seen him there.

Q. You saw him there several times? [51]

A. Yes.

Q. You are how old, youngster?

A. Pardon?

Q. How old are you, youngster?

A. Nineteen.

Q. How old is your sister?

A. Seventeen.

Q. Is it true that after you say Rudy LaMarr, the defendant, asked you if you wanted to be a prostitute, that you then took your seventeen year old sister down there and introduced her to him?

A. Well, he was in the club, I couldn't help but introduce him to her.

Q. Did you warn your sister about him?

A. Yes, she knew what he was.

Q. Before or after you introduced her to him?

A. Before, I believe.

Q. How long have you been going to the Sessions colored night club? A. Not very long.

Q. Well, a year? A. No.

Q. Since you left your husband and came up to Seattle? A. No. [52]

(Testimony of Beverly June Allen.)

Q. Six months? Have you been going there six months?

A. No, not that long, around three or four.

Q. That is a night club where they principally dispense liquor, whiskey and gin, other types of intoxicating beverages? As a matter of fact, you met Rudy LaMarr there about seven months ago, didn't you?

A. I really don't remember how long it has been.

Q. You wouldn't say that it wasn't seven months, would you?

A. I wouldn't say it was and I wouldn't say it wasn't.

Q. This is a club that most of its patronage comes in after midnight, one, two, three, four in the morning, isn't it? A. Yes.

Q. What time of night did you usually go there during the past seven months, two o'clock in the morning?

A. Well, when it opened, it was twelve or before twelve.

Q. It doesn't even open until around midnight, is that right?

A. I couldn't tell you.

Q. Do you know where the club is located?

A. Yes.

Q. What is the address? [53]

A. Fourteenth and Main.

Q. When he asked you if you wanted to become a prostitute, that was directly in the Sessions Club?

A. Yes.

(Testimony of Beverly June Allen.)

Q. And when you said no, that ended the matter, didn't it? A. For then it did.

Q. You say at one other time he asked you if you wanted to become a prostitute? A. Yes.

Q. And you said no? The answer is yes?

A. Yes.

Q. And that ended that?

A. Well, it just—there wasn't any more said about it.

Q. As a matter of fact, he asked you if you and your sister had found work in Portland, didn't he, legitimate work?

A. Yes, and we told him that we didn't.

Q. Told him you did not?

A. That's right.

Q. He asked you if you had been trying to find work, didn't he?

A. Yes, and we told him we did.

Q. Then he said, "Well, what do you want to be, a [54] prostitute, didn't he?

A. No, he didn't say that.

Q. Well, he never at any time asked you to be a prostitute, did he? A. Yes, he did.

Q. When was that?

A. I told you, the Sessions Playhouse, and then up in McLeod's, and then we spoke about it over at his house one day.

Q. This McLeod's or whatever you term it, that is a colored club in Portland? A. Yes.

Q. How many times were you up there?

A. Twice, two or three times.

(Testimony of Beverly June Allen.)

Q. Isn't that a club exclusively colored?

A. No.

Q. Did you see any other white people up there?

A. Yes.

Q. What percentage of people there did you see that were white?

A. Well, it wasn't very many but there was some white people.

Q. Were they white men that you saw there?

A. Men and women.

Q. After you introduced your sister to him, how many [55] times did you see him in Seattle, the defendant, before you left for Portland, Oregon?

A. Three or four times.

Q. As I understand it, the money was given to your sister to buy transportation tickets, is that right?

A. Yes.

Q. Are you sure he was on the same train even that you were on?

A. Yes.

Q. Did you see him board the train?

A. No, but I saw him on the train.

Q. He has never been with you or around you or exposed you to his company at any time in purely white society, has he?

A. No.

Q. The only times he has been seen with you are in colored clubs that you have frequented, isn't that true?

A. Yes.

Q. Clubs to which you have gone, colored clubs to which you have gone before you ever met him or were introduced to him, correct?

A. Yes.

(Testimony of Beverly June Allen.)

Mr. Beardslee: No further cross examination,
Your Honor. [56]

Redirect Examination

By Mr. Belcher:

Q. How long were you at the Carroll Hotel?

A. A week.

Q. Then where did you go?

A. To the New Washington Hotel.

The Court: In what city?

The Witness: In Portland, Oregon.

(Registration card marked Plaintiff's Exhibit 2 for identification.)

Mr. Belcher: I will ask at this time, if Your Honor please, that the witness from Portland, Mrs. Ruthman, be excused.

The Court: Is there any objection to Mrs. Ruthman being excused at this time?

Mr. Beardslee: Your Honor, I do want to ask one question before she is excused. Could you tell us why you were evicted from the Carroll Hotel in Portland?

The Witness: Yes, one day I wanted to borrow an iron from someone and our neighbor next door, which was William—Bill, I don't remember his last name——

Mr. Beardslee: That was the only reason? [57]

The Witness: Yes, and he was in our room because he brought the iron over. That's all that I can think of.

(Testimony of Beverly June Allen.)

The Court: Does that change your wish to excuse the witness?

Mr. Belcher: No, Your Honor.

Mr. Beardslee: It changes mine a little. I would just like to ask the witness before she goes, I don't want to hold her up from going to Portland——

The Court: Proceed to finish with this witness, after which you can interrogate the witness Mrs. Ruthman. Mrs. Ruthman will be recalled to the witness stand for that purpose.

Q. You have been handed what has been marked for identification Exhibit 2. Will you examine that? Did you ever see that before? A. Yes.

Q. What is it, if you know?

A. It is a registration card from the New Washington Hotel.

Q. Does it bear your handwriting?

A. Yes.

Q. What date? A. June 12th.

Q. What year? [58] A. 1950.

Q. What other handwriting does it bear?

A. My sister's, Clair Steven.

Q. Did she sign that card in your presence?

A. Yes.

Mr. Belcher: That is all.

The Court: Any cross examination?

Mr. Beardslee: No, Your Honor.

The Court: Did you wish to excuse her from the stand at this time?

Mr. Belcher: Yes, Your Honor. I offer this exhibit.

(Testimony of Beverly June Allen.)

The Court: Is there any objection?

Mr. Beardslee: No, I believe it is admissible, Your Honor.

The Court: Plaintiff's Exhibit 2 is now admitted.

(Plaintiff's Exhibit 2 received in evidence.)

The Court: Do you wish to recall Mrs. Ruthman?

Mr. Beardslee: Yes, Your Honor.

The Court: The Witness, Mrs. Ruthman, will return to the stand. [59]

MRS. CARRIE L. RUTHMAN

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows:

Cross-Examination

By Mr. Beardslee:

Q. Sorry to have inconvenienced you further, but do you recall who checked the two girls that just testified into the hotel there in Portland?

The Court: She previously testified on that, I think, but you may repeat that.

The Witness: My clerk, Mrs. Elliott, checked them in.

Q. You don't know a man by the name of Kirk, do you?

A. Yes, he lived in my hotel.

(Testimony of Mrs. Carrie L. Ruthman.)

Q. Your hotel strictly caters to white people, is that correct? A. Always, yes, sir.

Q. Did he recommend these people, do you know? Do you recall?

A. No, sir. Mr. Kirk didn't know them at all. He met them in the elevator of the hotel and it is true they borrowed an iron from this man, Mr. Kirk, but that wasn't [60] my reason for asking them to leave. They invited him into their room to drink beer, to which I strenuously objected, and that was my reason for asking them to leave the hotel.

Mr. Beardslee: That is all the questions I have.

The Court: Do you wish to inquire of this witness any further?

Redirect Examination

By Mr. Belcher:

Q. Do you know the defendant LaMarr?

A. No, I do not. The only time I ever saw the gentleman, he came to my desk one day, several days after those young ladies left and asked if they were in. I said no, they had left, and he asked me where they were and I told him I didn't know. He said he was very anxious to locate them, he was a friend of their mother, of the younger girl's mother, and she was very anxious about her and had sent him to Portland to find them and bring them home. That is the only time I ever met him.

Mr. Belcher: That is all.

(Testimony of Mrs. Carrie L. Ruthman.)

Recross-Examination

By Mr. Beardslee:

Q. He told you that the mother had contacted him to get him to locate these girls? [61]

A. That's right.

Q. If I understood you correctly, that was several days after the girls had left that he came to the hotel and made inquiry about them?

A. That's right.

Mr. Beardslee: That is all.

Mr. Belcher: The witness may be excused, Your Honor.

Mr. Beardslee: No objection.

The Court: You are now excused and may withdraw from the trial if you wish.

MRS. ROSE FERGUSON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher:

Q. Will you state your name, please.

A. Mrs. Rose Ferguson.

Q. Where do you live?

A. I reside at 1323 East Pine, Apartment 1.

Q. What relation, if any, are you to the two girls named in this indictment? [62]

(Testimony of Mrs. Rose Ferguson.)

A. They are both my daughters.

Q. When was Enola McMath born?

A. September 22, 1933, and she was born in Los Angeles, California.

Q. Where was Beverly June Allen born?

A. Beverly was also born in Los Angeles, California, August 3, 1933—pardon me, 1931.

Q. Were you at any time acquainted with the defendant in this case?

A. No, I have never seen the party, but I have talked to him over the telephone.

Q. What was the talk that he had with you?

A. He wanted to know where the girls were and he was very anxious to get hold of a suitcase that the girls——

Mr. Beardslee: I didn't hear you.

The Court: Read the answer.

(Last answer read by reporter.)

The Witness: ——that the girls had borrowed.

Q. Did you ever meet him at any time?

A. No, I did not.

Mr. Belcher: That is all.

Cross-Examination

By Mr. Beardslee:

Q. Did you ever call the defendant in Portland to ask [63] him about your girls, where they were?

A. No. I called Portland, the Carroll Hotel, to find out about the girls and Mr. LaMarr had called

(Testimony of Mrs. Rose Ferguson.)

me after that, wanting to know where the girls were. I did not call him but he had called me. I also called Portland myself, but the girls were not at the Carroll Hotel, and that is when I was beginning to worry.

Q. Had you had a report that they were in California?

A. A report that they were in California?

Q. Had anyone told you that they were in California?

A. I think Mr. LaMarr had mentioned something about the girls being in California and that he heard through a dancer. The name of the party I can't say, because I don't remember his name.

Q. It was at that time, wasn't it, that you expressed concern over the girls?

A. I called first to Portland, at the Carroll Hotel.

The Court: Just answer the question. Read the question.

(Last question read by reporter.)

The Witness: Yes, I was wondering where the girls were because I knew Mr. LaMarr was connected with them somehow.

Q. So you did ask Mr. LaMarr to try and locate them and send them home? [64]

A. I didn't ask him to send them home; I just told him I was worried about the girls, and he said if he run across the girls that he would send them home.

Mr. Beardslee: That is all, thank you.

Mr. Belcher: No further questions.

The Court: Step down.

GEORGE D. DAUGHERTY

called as a witness by and on behalf of plaintiff,
having been first duly sworn, was examined and
testified as follows:

Direct Examination

By Mr. Belcher:

Q. Will you state your name, please.

A. George D. Daugherty.

Q. Where do you live?

A. 1538 Southeast 29th Avenue, Portland, 15,
Oregon.

Q. What is your business?

A. I am assistant manager and clerk at the
Hotel Washington, Portland.

Q. I will ask you if you ever saw Exhibit 2
before? A. Yes, I have.

Q. What is it?

A. It is the registration card that we register
our [65] guests on as they arrive at the hotel.

Q. Do you recognize the persons who signed
that card? A. Yes, I do.

Q. Are they in the courtroom?

A. Yes, they are.

Q. Are these the two girls?

A. Yes, they are.

Q. What was the date of the registration?

A. June 1, 2:11 p.m., 1950.

Q. Did you ever meet the defendant LaMarr?

(Testimony of George D. Daugherty.)

A. On one occasion.

Q. What was that?

A. It was about June 8th or 9th or 10th. He came in inquiring of the girls.

Q. What did he say?

A. He handed me his card, Ali Raschid, metaphysicist.

Q. What?

A. Ali Raschid, metaphysicist. He claimed he was representing the mother, who was very worried about the girls, and he was trying to locate them for her.

Q. Were the girls registered at your hotel?

A. No, they had checked out previously.

Q. How long?

A. I believe they checked out on the 5th, about three or four days previous to the time he was in.

Q. Was there any record in your hotel, records of any telephone calls?

A. In reference to local calls or long distance?

Q. Long distance.

A. Long distance, there was one.

Q. Where was that call made to and by whom?

A. It was made from the girls' room to Richmond Beach, Washington.

Mr. Belcher: You may inquire.

Cross-Examination

By Mr. Beardslee:

Q. You said when Mr. LaMarr came into your hotel and made inquiries about the girls was any-

(Testimony of George D. Daugherty.)

where from three to five days after they had checked out, is that correct?

A. Approximately, yes.

Q. And he did advise you that the mother was anxious to locate them? A. That's right.

Mr. Beardslee: I have no further questions.

Mr. Belcher: Nothing further. May the witness be excused?

The Court: Any objection?

Mr. Beardslee: No, Your Honor.

The Court: This witness is excused. Call the [67] next witness.

Mr. Belcher: The government rests.

The Court: The defendant may now proceed.

Mr. Beardslee: I don't know whether I choose to put on any defense. I want to offer an argument to the Court in the morning. I was wondering if we might recess.

The Court: We can hear the argument now. We will determine the rest of the procedures later. However, at this time the jury will be excused under the Court's previous admonition. Remember and heed the Court's previous admonitions carefully in all respects during this overnight period when the jurors will be absent from the jury box. I ask the jurors to be here tomorrow morning at ten o'clock. The jurors are now excused until ten o'clock tomorrow morning and may retire until that time.

(Jury retires.)

The Court: I will hear you now.

Mr. Beardslee: May it please Your Honor, at this time the defendant challenges the legal sufficiency of the government's evidence to sustain the charge on either count of the indictment and moves for dismissal, or in the alternative requests a directed verdict of not guilty. [68]

I am morally certain in my own mind, my own recollection of the testimony, there isn't any evidence which would warrant the conclusion that the defendant transported by common carrier or even otherwise these two girls to Portland, Oregon for the purpose of practicing prostitution. The only evidence offered by the government was directly from the two girls. They said they went down there with the understanding that they were going to obtain legitimate employment, and that Mr. LaMarr advanced—one girl used the term "loaned them" the sum of \$35 for their transportation down there.

Now, aside from the testimony of the girls, everything else is based upon circumstantial evidence, and I think it is so well settled in law that it is now elementary that when circumstantial evidence is relied upon for a conviction, those circumstances must consist of a chain of circumstances in which there is no weak link. In other words, every link in that chain must be consistent with guilt and inconsistent with innocence.

They did say, the first girl testified Mr. LaMarr had recommended two different hotels. They said they phoned him. He made no effort to contact

them. They met him over at this colored club in Portland. What [69] did he ask them? He said, "Have you found work yet?" and they said "No."

All right, then they met him later. It is the purpose of their going down there that controls in this case. If someone wants to journey to Portland for the purpose of finding legitimate work and then it develops after they arrive that someone or other wants to or does fornicate, that is a matter to be handled by the state, not by this government. We are only concerned with the purpose of the transportation.

There isn't any inference of guilt or intent on the part of this defendant that can be drawn from the government's testimony. In fact, the two girls themselves definitely cleared the defendant when they each separately testified that they went down there to obtain employment, they did not have work here. The last girl testified she had not worked since she left her husband. No wonder they wanted to find work. I think it was admirable on their part to desire work; one a frequenter of night clubs, if not the other, that is true, but there are many people who go to night clubs that still desire to find honest, legitimate employment. There are many girls, if I understand correctly, and can believe what I read, that are promiscuous and nevertheless earn their own [70] livelihood.

Another part of the testimony, if Your Honor please, that to me was impressive was the last girl, "Did you ever give Mr. LaMarr any money?" "No," but he advanced them money and one girl referred

to it as a loan. Whether it was a loan or whether it was not I don't know, but the charge here is that LaMarr sent them down there to have them engage in prostitution for his benefit. The facts absolutely contradict that, every iota and item of testimony introduced.

I am not going to make any more lengthy argument tonight, but I wish the Court would seriously consider what I have said, because there just isn't any evidence here to send this case to the jury.

The Court: As to Count Two, Mr. Belcher, what have you to say, if anything?

Mr. Belcher: As to Count Two, if Your Honor please, the charge is——

The Court: I mean, in response to this challenge and motion.

Mr. Belcher: ——going from Seattle to Portland with the intent on the part of the defendant Rudolph LaMarr that the said Beverly June Allen should engage in the practice of prostitution and debauchery. The [71] evidence as it stands at the present time is from the lips of this witness that he propositioned this woman the second or third time he met her in Seattle. He formed the intent on the occasion when he asked her if she would go into the business of prostitution. He renewed this offer after inducing her to go to Portland by train.

If Your Honor please, the rule is not as restricted as it used to be in that this White Slave Traffic Act was enacted for the purpose of preventing commercialized vice. That rule has long since gone out the window, and the last expression of that is in

329 U. S. in the case of *Cleveland vs. U. S.*, decided by the Supreme Court of the United States on October 17, 1946.

It refers to the Ninth Circuit Court case of *Caminetti* with which Your Honor is very familiar. The rule is that the jury in this case is entitled to consider this evidence, the circumstances surrounding the entire transaction. The rule is well settled that the act of prostitution, the thing which motivated the movement in interstate commerce of these two girls, the intent was formed in Seattle here, under the evidence of this girl, where he asked her to practice prostitution. The fact that the crime was not [72] consummated, that is to say, that the purpose of the trip was not consummated, is wholly immaterial.

I quote, if Your Honor please, from *Qualls vs. U.S.*, the Fifth Circuit, decided July 5, 1945, 149 F. 2d 891.

“It is argued that the real object of the trip was legitimate and the sexual aspect incidental and not contemplated as the purpose of the transportation of the girl. This was proper to be argued to the jury, but there was no evidence that appellant in truth was recruiting Navy workers at all, that he had arranged to pick up any other girls at Bryson City and Franklin . . .”

This was a case where the man said he was recruiting Navy workers and he was trying to induce this girl to go in interstate commerce with the avowed purpose of turning her out as a prostitute, although the testimony was that she was seeking

employment, just as here. It was a proper case for argument to the jury.

“This was proper to be argued to the jury, but there was no evidence that appellant in truth was recruiting Navy workers at all, that he had arranged to pick up any other girls at Bryson City and Franklin, or had any job in Atlanta for this girl. In Atlanta [73] he told her he was working in Florida and tried to get her to go on there with him. The jury were warranted in thinking he purposed from the beginning to do just what he did do, and that he transported and caused to be transported in interstate commerce this girl for the purpose of having her engage in debauchery with him. This is within the very language of the Act, and the fact that she did not know his purpose when she agreed to go and successfully evaded it afterwards does not erase appellant’s offense, completed by transporting her from North Carolina into Georgia with the purpose stated. Mitigating circumstances, if any, were no doubt considered in sentencing.

“Judgment affirmed.”

The rule in this circuit is well established in the Caminetti case and reaffirmed, as I say, in the Cleveland case that is reported in 329 U.S. I submit that the motion should be denied.

The Court: The challenge is overruled and the motion for directed verdict and for dismissal as to each of the two counts is denied.

Those connected with this case are excused until tomorrow morning at ten o’clock. The court is adjourned until tomorrow morning at ten o’clock.

(At 5:08 o'clock, p.m., Tuesday, October 17, 1950, proceedings adjourned until 10:00 o'clock, a.m., Wednesday, October 18, 1950.)

October 18, 1950, 11:00 o'clock, A.M.

The Court: I think the jury might wish to have a recess now. I understand you have been there in the jury box during all the time you have been delayed. The jury will temporarily retire for a short recess.

(Jury retires.)

Mr. Beardslee: May it please Your Honor, at this time I would like to reserve an exception to the ruling made on my motion of last night.

The Court: Exception allowed.

Mr. Beardslee: And the defendant will now rest.

The Court: Will you wait until the jury returns for those procedural purposes.

Mr. Beardslee: Yes, Your Honor, but I would like to advise the Court on resting to renew the motion of last night without further argument, based upon the argument which I made last night.

The Court: Is there any objection to the Court considering this motion made after the defendant rests and that the Court then as of that time does consider the motion and does make the same ruling as previously made?

Mr. Beardslee: No objection to that, Your Honor, and if the Court will allow an exception to the adverse ruling.

The Court: Exception allowed. Let the record

show that it is to be noted in the record. Bring in the jury.

(Jury returns.)

The Court: May the record show call of the jury waived and that all the jurors are present and also all parties on trial with their counsel.

Mr. Belcher: Yes, Your Honor.

Mr. Beardslee: Yes, Your Honor.

The Court: The defendant may now proceed.

Mr. Beardslee: May it please Your Honor, at this time the defendant rests.

The Court: Let the record show, as the Court indicated it should show, which arrangement was made in the absence of the jury a moment ago with respect to the renewing of the challenge and motion and the Court's ruling thereon, the same being considered [76] renewed and the Court's previous ruling being the same and exception allowed.

It now remains only for counsel to argue the case on the merits upon the evidence received before the jury and thereafter for the Court to instruct the jury as to the law governing the case, and finally for the Court to submit the case to the jury for its decision and verdict.

In making these arguments, the plaintiff's counsel, Government counsel, has the right to make the opening argument and also the closing argument, and in between those will occur the defendant's argument. These arguments are not evidence, but they are intended to be a fair comment made by counsel on what they understand the facts to be,

and what the effect of the proof and facts may be respecting the issues in this case. Counsel have a right to make these arguments if they are fairly based upon evidence or reasonable inference of evidence, and the jury has the right and duty to consider those arguments, but if there is any conflict between the recollection of the jury as to the facts as to any point in the evidence which the evidence discloses, if there is any conflict between the jury's recollection and counsel's recollection, the jury's recollection prevails. It is for the jury to remember the evidence. [77]

At this time we will hear the opening argument of plaintiff's counsel. When arguing to the jury, counsel may take any position in the courtroom most agreeable to them.

Mr. Belcher: May it please the Court, counsel, ladies and gentlemen of the jury:

The only purpose of an argument on the part of the United States Attorney's office is to direct your attention to the evidence from which you are to arrive at your final verdict.

It is not going to be my purpose to try and make this jury believe that the evidence is any different than you have heard. It is as much my duty as an assistant United States Attorney to protect the interests of the defendant as it is to forward the interests of the Government. Your Government does not want an innocent person convicted of any kind of a crime, and I am not here begging you for a conviction.

The purpose of my remarks will simply be to

direct your attention to that evidence which I believe points clearly to the guilt of the defendant on both counts of this Indictment. You will recall the testimony of both of these girls was that this defendant represented to them at the time they first met him that he was a metaphysicist. You have not heard the definition of [77-a] a metaphysicist. It is a fortune teller. One of the girls, I think, testified that he said he was a mental physician.

I don't believe that in using your good common sense—that is all you are required to do here to arrive at the truth of this case—that any further evidence than that which has come from the mouths of these two girls is necessary to enable you to find beyond a reasonable doubt that the defendant did, as charged in the Indictment, on or about the 15th of May, 1950, “. . . knowingly and unlawfully persuade, induce and entice Enola McMath, a female, who had not attained her eighteenth birthday, to go from Seattle, in the Northern Division of the Western District of Washington, by common carrier, to Portland, Oregon, with the intent on the part of the defendant Rudolph LaMarr that she, the said Enola McMath, be induced to engage in prostitution and debauchery.”

What was the testimony in that respect? This young lady testified that when she first met this man at the Sessions Club here in Seattle, that she danced with him. On two or three other occasions, they had several conversations. She doesn't say and hasn't said that he at any time propositioned her to engage in prostitution. What, then, was in this

man's mind when [77-b] he suggested to these girls that there was more work in Portland than there was in Seattle? Don't you believe from the evidence that has come from the lips of these girls, this girl in particular, Enola McMath, that it was the intent and purpose of this defendant to seek sexual relations with her? She has testified that she did have sexual relations with him at Portland on two different occasions. That is debauchery.

On the second count, the undisputed evidence in this case is that after Enola had introduced her sister, Beverly June Allen, to the defendant at the Sessions Club in Seattle, that the defendant propositioned her to engage in prostitution.

Now, that was in Seattle, long prior to the time he paid their fares, gave to Enola \$35 for the purpose of transporting her and her sister from Seattle to Portland. The testimony is that they went to the Great Northern station, if you recall, with the defendant himself, and the conversation that occurred at that time was that he would accompany them but he would travel in a different coach.

Now, there must have been some reason. If this was a legitimate, up-and-up proposition of attempting to take these girls to Portland to find them work, why would it be necessary for him to travel in a separate [77-c] coach? The inference to be drawn from that is that he didn't want to be seen in the presence of the girls on a common carrier, because he knew that if he was seen in the presence of these girls on the railroad train transporting them from Seattle to Portland, Oregon, he was violating the

Mann Act or White Slave Act, and he did not want to be caught.

This girl in the second count is Beverly June Allen. She is the girl that prior to the time he furnished the money for the tickets to go to Portland, he propositioned her to engage in prostitution. The undisputed evidence is that prior to that transportation, the defendant himself told them the hotel at which they should register.

Now, they did register there. There is in evidence Exhibit 1, which shows the two girls, under the names of Clair Steven, who is the victim in Count II, signed this registration card at the Carroll Hotel, the very place that the defendant told these girls to go. The girl in Count I registered under the name of Germain Pica.

You saw these two girls on the witness stand. I believe that you are sufficient judges of human nature to be able to determine from their conduct on the witness stand whether or not you believe they were [77-d] telling the truth when they told this story that they told you.

Undoubtedly the defendant had a lust, sexual lust, for this younger girl in Count I, and after arriving in Portland, he induced her to go to his hotel room. She has told you what occurred there. She has told you why it happened. She said she was afraid of him, not only on one occasion, but on two occasions, so that so far as Count I in this case is concerned, you are at liberty, I think the Court will instruct you, to take into consideration all of the circumstances.

Intent is an ingredient of this crime. I apprehend that the Court will instruct you on the question of intent. It is physically impossible for you or for me to look into anybody's mind and determine what his intent on any given subject is. The very acts, the very things that occurred, relate back to the intent that that man had, the defendant had, at the time he gave them the money to pay their transportation from Seattle to Portland. He formed that intent before he ever left with these girls for Portland. His very acts and conduct show clearly that that was his intent.

As to the other girl in Count II, as I have said before, he propositioned her to engage in prostitution in the City of Seattle several days prior to the time [77-e] that he furnished the money to transport her by the Great Northern Railway from the City of Seattle to the City of Portland, State of Oregon. He followed up that intent by conferring with her again, having a conversation with her again that she engage in prostitution in the State of Oregon. She didn't do it, but that doesn't make any difference. The gist of the crime is the transportation between Seattle in the State of Washington and the City of Portland in the State of Oregon. He does not have to accomplish his purpose, that intent.

The girl has told you that she did not engage in prostitution either here in the City of Seattle or in the State of Oregon, but there is no evidence to contradict or controvert her statement that that proposition was made to her in the City of Seattle and again made to her after she arrived in Portland

at his expense. I don't know what further evidence any jury requires in this type of case.

It wasn't anything very pleasant for these young girls to have to come here and tell you jurors the story that they unfolded to you. Your Government and my Government enacted this Mann Act for the protection of girls just such as these two girls against the lust of men, and it is your duty as jurors and it is my duty as an officer of this court to see that the guilty are [77-f] punished if they are guilty.

You will be instructed by the Court that before you can find the defendant guilty you must find beyond a reasonable doubt first that he had the intent to do the things that were done. He carried out the intent in the one case by his lust, his sexual lust. He was unable to carry out his intent in the other, but that does not relieve him. The gist of the crime is the transportation in interstate commerce for that purpose. Your Congress does not want interstate commerce polluted, as evidenced by the plain language of the statute, which will undoubtedly be called to your attention in the Court's instructions to the jury.

I submit in all candor that there is but one verdict that you can return conscientiously in this case, based upon the testimony of the witnesses from the witness stand, together with the circumstances surrounding that transportation. Is there anything here to refute the story of these girls? I submit, ladies and gentlemen of the jury, that it is your sworn

duty in this case to find the defendant guilty as charged on both counts. Thank you.

The Court: At this time we will hear defendant's answering argument.

Mr. Beardslee: May it please Your Honor, Mr. Belcher, [77-g] ladies and gentlemen of the jury:

I am always reluctant to approach the final stage of a lawsuit, because I know that it affords me the last opportunity that I may have of properly representing a client who has placed his confidence in me as an attorney, who has believed that I will fairly represent the matters to you, not only fairly, but also competently. There are many things that worry a lawyer in the trial of a lawsuit. They principally concern the fear that an attorney has that he may not competently or adequately represent the person who has placed confidence in him. I started out as a school teacher; I wish I had sense enough to keep it up. I wouldn't have so many sleepless nights.

The principal thing that worries me in this case is that I cannot help but feel that there may be some latent prejudice against a colored man associating with white women, and by that I don't mean prejudice on its face, but it may be something latent that you are not conscious of until the actual facts are presented to you.

With respect to that, I hope you will all consider who sought who in this case. The defendant, Rudy LaMarr, was at a Negro nightclub where Negroes gather. These girls, first, the older one, came into the club, was [77-h] introduced to him. She said

she was with a party of other people. All right, this wasn't an idle case or a separate case or an individual case of someone going slumming. If you were, and you were with a party of white people, you wouldn't be introduced to a colored person you didn't know, would you? You would resent anyone, whether white or colored, coming to you, unless it was some celebrity that maybe you wanted to meet so you could say that "I have met so-and-so."

But that was not the question here. The older girl said she had been going there for over seven months, maybe not over, but approximately seven months. Why? All right, the older girl did not testify, as Mr. Belcher said, that Rudy LaMarr, the defendant in this case, tried to induce her into prostitution. She testified LaMarr asked her if she wanted to become a prostitute, and that is the most that you can place on that.

Mr. Belcher spoke with some disparagement about the defendant being a metaphysicist—I'll twist my tongue on that—well, a fortune teller. He isn't charged in this case with being a fortune teller. With respect to the change of name, I suspect that the name Ali Raschid probably carries more mystery as far as a fortune teller is concerned than the simple name of Rudy LaMarr. Is there any harm in that? And if there [77-i] was, it isn't involved in the trial of this case.

Now, Mr. Belcher has interpreted the testimony in one way, and if he is sincere, I can only say that I sincerely do not agree with his interpretation of it. If it wasn't for disagreement on many issues,

we wouldn't have Democrats opposing Republicans. We wouldn't have the trial of lawsuits, because we could always agree on something. We wouldn't have horse races, we would always know which horse was going to win. I do not accuse Mr. Belcher of insincerity, but I do feel that he has misinterpreted the testimony in this case.

It isn't incumbent upon the defendant to deny an allegation that is not proven. I think it would be a mistake to lend dignity to a denial. For instance, if somebody questions the authenticity of my birth, questions the character of my mother in a statement that many of you—the term that is used, that many of you are familiar with—I am not going to dignify that with a denial. I would take one of two alternatives; I would either hit him in the nose or else I would turn and walk away and see that that gentleman never entered my home again for such a silly and absurd and illfounded accusation.

I hope you folks won't think that I am trying to insult your intelligence in arguing this. You have heard the evidence as well as I have. Many of you have had as much, some of you more, experience in life than I have. You are just as competent to analyze testimony and the credibility of witnesses who have been on this stand as I.

I do not know all of the instructions the Court will give you, but when those instructions are given I sincerely hope that you will pay particular attention to them, because regardless of what counsel and I may believe the law to consist of, the final

authority in your deliberations is the law given to you by the Court in its instructions.

I do not know, but I am morally certain that in this instance the Court will instruct you definitely that if you believe, although you should be slow to believe it, but if you do believe that a witness has wilfully testified falsely in any one respect, you may thereupon disregard all of the other testimony of that witness unless it is substantiated by other credible testimony.

Let's start with the other girl. She met LaMarr. She testified, unless I am badly mistaken, and it was with some reluctance and after some hesitation, that when she first met LaMarr, that he asked her if she wanted to become a prostitute. She said no. Did he [77-k] ever pursue that issue any further? Except the instance alleged in Portland, she said no.

Well, I don't know how you can actually receive that testimony without not only a grain of salt but a considerable quantity of it, because she testified that sometime later she brought her 17 year-old sister down and introduced her to him. Now, you know that just doesn't make sense.

I would like to suggest this to you now, that I dislike, I abhor the duty of having to cross-examine a woman, because I may have given the impression that I was brutalizing those girls. Well, I hope that none of you have that impression, but if you do have, I would like to have you understand that that should be held against me, not against the defendant, because he had no control over my cross-

examination. I was acting on my own initiative and what I thought was my duty in an effort to get at the real truth in this matter.

I believe that the Court will instruct you that prostitution means something that is commercialized. I think most of you have heard of the activities of panders, and, if you will excuse the term, pimps. They commercialize on women. They put them out for hire. Now, has that ever been suggested in this case? Both these girls testified that they went to Portland with [77-1] the understanding that they gave Rudy LaMarr, that they were going down there to seek legitimate employment, not to go down for prostitution.

It has been my experience through several years' practice of the law that a greater percentage or majority of men are made suckers of by women than women have been made suckers of by men. Now, from your evidence here, isn't it plainly indicative of the fact that Rudy LaMarr was honestly trying to help these girls? They wanted to go down for legitimate employment, they told him they were. He furnished them \$35. After they had been in Portland for some time, he gave them another \$70, and their testimony is vague as to whether they wanted it to pay up their bills or whether they wanted to go home.

Again getting back to the place, who sought who. After they arrived in Portland, did Rudy LaMarr look them up? No, they called him and arranged to meet him where? At a Negro club. And what was the first thing he asked them? "Are you working,"

still referring to this legitimate employment they were coming down on. "No." If he hadn't been so stupid, if he had had sense enough to inquire into their history before they ever left Seattle, he would have realized probably they didn't intend to work. They would rather live on [77-m] borrowed money.

You have heard the older girl testify; had she worked; No, she had been married. She left her husband and child in California, came up here, for what purpose? I don't know, but I know what she did, she became a frequenter of Negro nightclubs. How can you credit the testimony of a person with that background?

But even if you do credit the testimony, what is the worst that she has said? That Rudy LaMarr asked this older girl if she wanted to be a prostitute. That, she said, hapened up at the Sessions Club and again in Portland, he asked her if she wanted to become a prostitute. Did he urge? Did he entice? Under her testimony, I mean, now. I have grave doubts in my mind, and I think you have, too—I hope you have—that he ever made that statement, but if he did, is there any enticement, any inducement? She testified on the witness stand, perhaps reluctantly, that on each occasion she said no, and nothing further was said by Rudy LaMarr.

Now, back to the younger girl. There again, it was with considerable reluctance that I felt it my duty to cross-examine her. She testified the same as her sister did, that they were going down to get legitimate work. They told LaMarr that is what

they were going down for. They registered. She again affirmed her [77-n] sister that in this conversation after they had phoned him, they were the pursuers, that after this conversation, subsequent to their calling him, they met him there. What was he asking? "Well, have you found jobs? Are you at work?"

How can you figure an evil intent in a man's mind? After all, intent is something that we cannot measure. I may be so angry on occasions that I intend to do many things that are antisocial. I may intend to punch someone, but I don't go through with it because I do realize that civilized people don't engage in fist fights, especially after you reach my age.

All right, this girl said that she had intercourse with LaMarr at his home in Portland. She said the reason why she did, that she was afraid of him. Do you remember how I developed that, her fear, brought out the fact that this nightclub—and I think some of you people realize why they do have policemen there, if folks become unruly, they hire policemen in uniform when they are off duty to keep a certain amount of order in the event of a fight or something like that to protect the nightclub personnel. Well, if she was afraid of him, all she had to do was go over and speak to that policeman.

She boarded a train, I believe it was the [77-o] older girl testified he rode on the same train but in an entirely different car or section of the train. If she was afraid of him, why wouldn't she have

told the conductor or some official on the train? Why wouldn't she have stopped at Tacoma, got off the train and come back home? She said she had money left over when she arrived in Portland.

I don't believe that Mr. Belcher should seriously argue to you that the statement of these girls is true in any particular. I have often wondered why this case originated. I thought I was beginning to find out when one of these girls testified about his attempt to dye her hair at her request—I don't know whether you call it dyeing, or what they did. I guess he wasn't too experienced, it turned out green, and she said she was highly resentful of it. That may have originated it.

There was another matter of evidence that to me was important. There seemed to be a decided reluctance on the part of the prosecuting witnesses to come out with the truth. The matter I was about to refer to is that the mother admitted that she had a conversation with LaMarr over the phone, said she was worried about the whereabouts of her daughters and asked him if he would find them. He did, he went first to the—was it the Carroll Hotel? Maybe you folks remember that [77-p] better than I do—several days after the girls had left. Now, if he had wanted them down there for the purpose of prostitution, he would have been seeking them every day, wouldn't he? No, several days after they left there, after the mother had expressed some worry and concern over them.

All right, then, through some information he went to the Washington Hotel. He identified himself

and he told them why he was inquiring about the girls, the mother wanted them. Now, the mother admitted, finally conceded that that was true, and even that, if I recall the testimony of the Washington Hotel's clerk correctly, was three or four or more days after the girls had left that hotel. He didn't even know they had been in there. These fellows that want to use women for prostitution, they keep constant track of them, so I am told, daily reports. No effort on his part to keep in contact with them at all, in fact, the only time he had contact with them was when they sought him out. That to me was of considerable importance.

The liberty of most of our people in this country is of more value to them than life itself, and I am inclined to believe that a colored person probably values his liberty as much as we white people do. You have all read the talk of Patrick Henry prior to the [77-q] institution of the American Republic when we sought our independence from England. You remember the golden truth of his talk, "Give me liberty or give me death." That is the theme song of most of our people.

I know, or at least, I believe, that you will be instructed that you are not to be influenced in your verdict by passion, prejudice or sympathy, but I am at liberty to advise you that this charge is of a very serious nature. The maximum penalty provided is very high.

You notice that we had many challenges we were permitted to use. I would like to tell you why that is. The law through the wisdom of the ages has

definitely decreed every man accused of an offense is entitled to a jury of his peers, an unprejudiced jury, unprejudiced to any extent whatsoever. That is why the law says that you must presume a man to be innocent unless he be proven guilty beyond all reasonable doubt, and that means guilty of the charge with which he is faced. A reasonable doubt means, of course, a substantial doubt, not just a fictitious one.

Mr. Belcher, if I understood him correctly, in his argument to you said, look into his mind and find him guilty. If that isn't the purest speculation in the world, I don't know. All of his acts are to the contrary. [77-r]

On this matter of circumstantial evidence, what are the circumstances? That he loaned them money. Is that consistent with guilt? No, it is consistent with innocence on this charge. In circumstantial evidence all of the circumstances must, in my opinion, be consistent with guilt. If there is any one circumstance that is inconsistent with guilt but consistent with innocence, then it is your duty to disregard circumstances that might be conflicting therewith.

I could go on and argue this as long as the Court would be patient enough to permit me, but because the evidence consumed only about half a day in trial, and because you are just as capable, if not more so, of remembering the evidence, because you are unbiased and because I may be biased for fear that I have not properly conducted the trial, you

are in a better position to adjudge the evidence than I am.

I again want to suggest that I sincerely hope that you will listen attentively to the Court's instructions, and if I have misquoted any evidence, I hope again that you will hold that against me, not against my client. I would like to have—oh, not a hasty deliberation, but I think this man is entitled to acquittal, and I think he is entitled to a fast acquittal.

The Court: We will hear the Government's closing [77-s] argument.

Mr. Belcher: If Your Honor please, it is not a question, as counsel suggested to you, as to who sought who in this case. These girls are not on trial. What may have been their intention is an entirely different thing than what was the intention of the defendant with his philanthropy. It stands to reason that no man, white or black, is giving to a woman \$105—that is what it was, \$35 and \$70—unless he expects something in return.

You will recall the testimony of Enola that she was employed as a waitress, that this man telephoned her and told her he was coming up from Portland and was going to drag her out of that restaurant. She didn't go to work the next day and she lost her job on account of it.

The testimony of these two girls is that the defendant, if you please, not they, the defendant, said that there was much more work in Portland. Who suggested the Portland trip under the testimony in this case? Was it suggested by these girls

or was it suggested by the defendant? You heard the evidence. No, you are not concerned with what the intent of these girls was at all. What man is putting up \$105? He is not known as a philanthropist, at least, there is no testimony [77-t] here to that effect. Why these girls? Why so interested in seeking employment for others in another state? He made it impossible for this girl, Enola, to continue in her job as a waitress in the City of Seattle, and it was he who suggested the trip to Portland and not either of these girls. I admire the girls for refusing to go unless they both went, self-protection.

You judge a person's intent in the ordinary affairs of life by what they do. It is the only manner in which you can determine what a person's intent is. What did he do? He formed the intent in Seattle when he propositioned one of these girls to be a prostitute. He formed that intent in Seattle. Then he connived to pay their fare to Portland. They don't deny in this record that he paid that transportation. That in itself, coupled with the other facts, shows what his intent was, and I say that a person is very gullible who cannot conclude that that was the intent of this defendant in this case. Thank you.

Mr. Beardslee: May it please Your Honor, could I be excused from the courtroom? Mr. Gemmill, associated with me, will be here.

The Court: I ask the defendant if he approves of the request just made by Mr. Beardslee. Do you

approve of Mr. Beardslee's absenting himself during the [77-u] remainder of the trial?

Defendant Raschid: That's okay.

The Court: Do you accept Mr. Gemmill in all respects as and for your attorney during all these proceedings?

Defendant Raschid: Yes, sir.

The Court: Do you agree to so act, Mr. Gemmill?

Mr. Gemmill: Yes.

The Court: Mr. Beardslee is excused under those conditions.

Court's Instructions

The Court: Members of the jury: You have heard the testimony and arguments of counsel. After the Court instructs you, you will retire to the jury room to consider your verdict.

In this case the indictment reads in substance and effect as follows:

"Count One, the grand jury charges that on or about May 15, 1950, the defendant, Rudolph LaMarr, who stated at his arraignment that his true and correct name is Ali Raschid, did knowingly and unlawfully persuade, induce and entice Enola McMath, a female, who had not attained her eighteenth birthday, to go [77-v] from Seattle, in the Northern Division of the Western District of Washington, by common carrier, to Portland, in the State of Oregon, with the intent on the part of the defendant Rudolph LaMarr that she, the said Enola McMath, be induced to engage in prostitution [77-w] and debauchery," in violation of the law.

As to Count Two, the grand jury charges "that on or about May 15, 1950, the defendant, Rudolph LaMarr, who stated at the time of his arraignment that his true and correct name is Ali Raschid, did knowingly and unlawfully persuade, induce and entice Beverly June Allen, a female person, to go from Seattle, in the Northern Division of the Western District of Washington, to Portland, in the state of Oregon, with the intent on the part of said defendant Rudolph LaMarr that the said Beverly June Allen should engage in the practice of prostitution and debauchery, and the said defendant Rudolph LaMarr did thereby knowingly cause said Beverly June Allen to go and to be transported as a passenger upon the line and route of a common carrier in interstate commerce from Seattle, Washington, to Portland, Oregon," all in violation of the law.

In this case there is one defendant on trial before you on the two counts of the indictment.

To the indictment, and to each of the counts thereof, the defendant on trial has entered a plea of not guilty. This plea of not guilty puts in issue every material allegation of the indictment on which the defendant is being tried, and casts on the government the burden of proving the guilt of the [78] defendant by the evidence beyond a reasonable doubt. The defendant on trial is not called upon to disprove the charges of the indictment, nor to prove his innocence.

The indictment is merely the paper charge and formal accusation against the defendant, which he

has had no opportunity to answer until this trial, and the indictment is not to be considered by you as evidence in any sense against the defendant, and the fact that the indictment has been returned by the grand jury is not to be considered by you in any way as evidence against the defendant of the truth of what it states. The burden is always on the government to prove the defendant guilty by competent evidence beyond a reasonable doubt, and that burden must be successfully met by the government before you can convict the defendant.

In this case you must consider separately each count of the indictment upon which the defendant is being tried. You must decide the guilt or innocence of the defendant as to each count separately, and if you have a reasonable doubt as to any material allegation of the particular count or counts of the indictment you are considering, it is your duty to acquit the defendant as to such count or counts; but [79] if you have no such reasonable doubt concerning any such allegation, it is your duty to convict the defendant on each count as to which, under the evidence, if there is any such count, you have no such reasonable doubt.

The defendant on trial, as well as every defendant in a criminal case, is presumed to be innocent of the charges contained in the indictment until he is proved guilty by the evidence beyond a reasonable doubt, and this presumption is one of his important rights, not to be ignored or lightly considered either by the Court or by the jury.

It is one of the important rights which the law

accords all persons accused of crime. It attaches to them and continues with them throughout all stages of the trial and throughout all stages of your deliberations until it has been overcome by the competent evidence in the case and until the guilt of a particular defendant has been established by the evidence beyond a reasonable doubt, notwithstanding the presumption of innocence with which the law clothes all accused persons. This applies to the defendant on trial here.

By the expression "reasonable doubt" is meant in law just what those words in their ordinary and every [80] day use imply; they have no technical or legal meaning different from their ordinary meaning. A reasonable doubt is a doubt which is based upon reason or is a doubt that is not unreasonable, and not merely imaginary or capricious. It is such a doubt, as, if entertained by a person of ordinary prudence, sensibility and decision, he would allow to influence him in transacting the graver or more important affairs of life, causing him to pause and hesitate before acting thereon. It must be a real and substantial doubt and it must rise out of the honest minded, common sense, consideration and application of the evidence in the case or from lack of evidence in the case.

If from a fair and candid consideration of all the evidence you can say upon your oath as jurors that you have an abiding conviction of the truth of the charge to a moral certainty, then you have no reasonable doubt and should convict. If you have no such moral convictions, or if you entertain doubts

for which sane and satisfactory reasons can be assigned in your own minds, you must give the defendant the benefit of that doubt and find him not guilty.

Even though the evidence in this case should engender in your minds a strong suspicion of [81] probability of guilt of the accused, still the defendant cannot be convicted unless you are satisfied beyond a reasonable doubt of his guilt.

In considering the evidence in this case, I charge you that it is not sufficient for you to find merely that the evidence adduced is consistent with the theory of the defendant's guilt, but before you can find the defendant guilty you must believe beyond a reasonable doubt that the evidence is inconsistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt.

If the testimony in this case, in its weight and effect, be such that two conclusions can be reasonably drawn from it, one favoring the defendant's innocence and the other tending to establish his guilt, then you should apply the presumption of defendant's innocence and find the defendant not guilty.

The law does not require the government to prove a defendant guilty beyond all possible doubt, as such proof in many cases would be impossible; but the government must prove the defendant guilty beyond a reasonable doubt as defined in these instructions. A reasonable doubt may be created by lack of evidence or it may be created by the evidence itself.

You are instructed that while a defendant at [82]

the beginning of the trial is presumed to be innocent, yet if and when during your deliberations the proof shows his guilt beyond a reasonable doubt, then the presumption of innocence disappears from the case.

The Statute under which the defendant is charged in Count One of the indictment provides in substance and pertinent part:

“Whoever knowingly persuades, induces, entices or coerces any woman or girl who has not attained her eighteenth birthday, to go from one place to another by common carrier in interstate commerce * * * with intent that she be induced or coerced to engage in prostitution or debauchery * * *” (shall be punished as the Statute provides).

The Statute under which the defendant is charged in Count Two of the indictment provides in substance and pertinent part:

“Whoever knowingly persuades, induces, entices or coerces any woman or girl to go from one place to another in interstate commerce * * * for the purpose of prostitution or debauchery, * * * or with intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution and debauchery * * * whether with or without her consent, and thereby knowingly [83] causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce * * *” shall be punished as the Statute provides.

The Act of Congress forbids any person to know-

ingly persuade and induce any woman or girl to go from one place to another in interstate commerce for the purpose of prostitution or debauchery, or with the intent and purpose on the part of such person that such woman or girl shall be induced to engage in the practice of prostitution or debauchery.

If you find from the evidence, beyond a reasonable doubt, that the defendant, Rudolph LaMarr, did knowingly persuade and induce Enola McMath, named in Count One, to go from Seattle, Washington, to Portland, Oregon, with the intent and purpose on the part of said Rudolph LaMarr that said Enola McMath, who at that time had not attained her eighteenth birthday, should be induced to engage in prostitution and debauchery, then it is your duty to convict the said defendant on Count One.

If you find from the evidence, beyond a reasonable doubt, that the defendant, Rudolph LaMarr, did knowingly persuade and induce Beverly June Allen, [84] named in Count Two, to go from Seattle, Washington, to Portland, Oregon, with the intent and purpose on the part of said Rudolph LaMarr that said Beverly June Allen should be induced to engage in prostitution and debauchery, and if you further find that the defendant thereby knowingly caused the said Beverly June Allen to go and be transported as a passenger upon the line and route of a common carrier in interstate commerce from Seattle, Washington, to Portland, Oregon, then it is your duty to convict the defendant on Count Two.

Intent is an ingredient of crime. It is psycho-

logically impossible for you to enter into the mind of the defendant and determine the intent with which he operated. You must, therefore, determine the motive, purpose and intent from the testimony which has been presented, and you will consider the motive, purpose and intent from the testimony of the witnesses, bearing in mind that the law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent.

In order to convict the defendant as to Count One, it is necessary for the government to prove beyond a reasonable doubt that the defendant entertained in his [85] mind a criminal intent, that is to say, an intent to persuade, induce and entice the certain woman, namely, Enola McMath, to go from Seattle, Washington, to Portland, Oregon, by common carrier with the intent on the part of the defendant that she be induced to engage in prostitution and debauchery. The government is required to prove that such criminal intent on the part of the defendant was conceived by him, if conceived at all, while he was yet in the city of Seattle, Washington.

Such an intent first conceived at the end of an interstate journey is not sufficient, and in order to convict the defendant on Count One, you must first find that, before the journey began, the intent on the part of the defendant that Enola McMath be induced to engage in prostitution and debauchery, if it existed at all, must have been in the defendant's

mind and was formed by him before the interstate journey began.

Similar principles are involved in the allegations as to Count Two. As to that count, in order to convict the defendant, it is necessary for the government to prove beyond a reasonable doubt that the defendant entertained in his mind a criminal intent, that is to say, an intent to persuade, induce and entice Beverly June Allen to go from Seattle, Washington, [86] to Portland, Oregon, with the intent on the defendant's part that she should engage in the practice of prostitution and debauchery. The government is required to prove that such criminal intent on the defendant's part was conceived by him, if conceived at all, while he was yet in the city of Seattle, Washington.

Such an intent first conceived at the end of an interstate journey is not sufficient, and in order to convict the defendant as to Count Two, you must first find that, before the journey began, if one did begin, the intent on the part of the defendant was formed in his mind that Beverly June Allen should engage in the practice of prostitution and debauchery at the end of the journey, and further that with such intent, the defendant also knowingly caused said Beverly June Allen to go and to be transported as a passenger upon the line and route of a common carrier in interstate commerce from Seattle to Portland, and that the intent in each instance mentioned in that Count Two was formed in defendant's mind before the interstate journey began.

You are instructed that before you can convict the defendant as to Count One, it must be proved by the evidence to your satisfaction beyond a reasonable doubt that the defendant persuaded, induced and enticed Enola McMath to go from Seattle, Washington, to Portland, [87] Oregon, on a common carrier as alleged for the purpose stated in that count.

And if plaintiff government fails to so prove such elements of the offense or fails to so prove that the defendant so persuaded, induced and enticed her to go from Seattle, Washington, to Portland, Oregon, for the purpose that she be induced to engage in prostitution and debauchery, then, you should find the defendant not guilty as to Count One and acquit him on that count.

You are instructed that before you can convict the defendant as to Count Two, it must be proved by the evidence to your satisfaction beyond a reasonable doubt that the defendant persuaded, induced and enticed Beverly June Allen to go from Seattle to Portland for purposes similar to those stated in relation to Count One in relation to another person and it must further be so proved that defendant thereby knowingly caused Beverly June Allen to go and to be transported as a passenger upon the line and route of a common carrier in interstate commerce from Seattle, Washington, to Portland, Oregon, as alleged.

And if the plaintiff government fails to so prove such elements of the offense or fails to so prove

that the defendant so persuaded, induced and [88] enticed her to go from Seattle, Washington, to Portland, Oregon, with the intent that she should engage in the practice of prostitution and debauchery or fails to so prove that defendant by such persuasion, inducement and enticement so caused such transportation, then, you should find the defendant not guilty as to Count Two and acquit him on that count.

It is no violation of the law for this defendant, or any person, to transport any woman in interstate commerce for lawful purposes and if you find in this case as to Count One that the defendant's only purpose or intent was that Enola McMath would go from Seattle, Washington, to Portland, Oregon, for legitimate purposes you must in that event find the defendant not guilty as to Count One.

And if you find in this case as to Count Two that the defendant assisted Beverly June Allen in going or knowingly caused her to go or to be transported as a passenger upon the line and route of a common carrier in interstate commerce from Seattle to Portland for legitimate purposes and not with the intent on the part of the defendant that Beverly June Allen should engage in prostitution and debauchery, then you must find the defendant not guilty as to Count Two.

You are instructed that under the law [89] involved in this case, sometimes called the Mann Act and the White Slave Traffic Act, the mere acquiescence or willingness or desire of the woman in question to be transported does not excuse the defendant

at all. The object of the Act is to prevent any person from transporting women or any woman in interstate commerce for prostitution and debauchery regardless of whether or not the woman of her own volition would like to go.

The term "interstate commerce" includes the transportation of a woman from one state to another for the purpose of prostitution and debauchery.

The term "prostitution" as used in the indictment means commercialized sexual vice; and the term "debauchery" as used in the indictment means that the woman in question is to be subjected repeatedly to unlawful sexual intercourse, fornication or adultery, or unlawful indulgence of lust.

Transportation of women in interstate commerce for the purpose of prostitution and debauchery may be effected by a train which transports such a woman from a place in one state to a place in another state.

In this case it is not necessary that the government prove that the violation charged against the defendant occurred on the specific date or dates mentioned in the indictment. It is sufficient if [90] the proof of the government shows beyond a reasonable doubt that the offense charged occurred within three years before the grand jury returned the indictment against the defendant. Such indictment in this case was returned and filed on July 13, 1950, so that it is only necessary for the evidence to show that sometime between May 15, 1950, and

July 13, 1950, the trip and transportation charged in the indictment occurred.

In order for you to convict the defendant of the charge contained in Count One of the indictment, it is not necessary for the government to prove nor for you to find that the defendant accomplished his purpose of having Enola McMath engage in prostitution or debauchery at the end of the interstate journey, if you should find beyond a reasonable doubt, from all of the evidence, that that was the intent of the defendant prior to the commencement of the interstate journey. It is sufficient if you find from the evidence, beyond a reasonable doubt, that defendant persuaded, induced or enticed Enola McMath to go from Seattle, Washington, to Portland, Oregon, by common carrier for any one or more of those purposes.

There are two kinds of evidence. Direct or positive, and circumstantial. Direct and positive testimony is that which a person observes or sees or [91] which is susceptible of demonstration by the senses, and circumstantial evidence is proof of such facts and circumstances concerning the conduct of the parties which conclude or lead to a certain inevitable conclusion. Circumstantial evidence is legal and competent as a means of proving guilt in a criminal case, but the circumstances must be consistent with each other, consistent with the guilt of the parties charged, inconsistent with their innocence and inconsistent with every other reasonable hypothesis except that of guilt, and when circumstantial evi-

dence is of that character, it is alone sufficient to convict. You will review all the circumstances in the light of this instruction.

You are the sole and exclusive judges of the evidence, and of the credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of a witness, you have a right to consider his demeanor upon the witness stand, his apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates, and the interest, if any, you may believe a witness feels in the result of the trial, and any other fact or circumstance [92] arising from the evidence which appeals to your judgment as in anywise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to.

You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness has willfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely, except insofar as the same may be corroborated by other credible evidence in the case.

You are to draw no inference of guilt against the defendant because he has not testified in his own behalf. As heretofore stated in these instructions, he is presumed innocent of any crime and this presumption remains with him throughout the trial unless and until the government proves him guilty

to the jury's satisfaction beyond a reasonable doubt. He is free to testify or not as a witness in his own behalf, but no presumption or inference of guilt is to be indulged by you from his failure to testify.

You are instructed that the government does not desire to have you bring in a verdict finding the defendant guilty unless the verdict is supported by the [93] evidence beyond a reasonable doubt, but that neither does the government want a guilty defendant to escape.

It is the duty of the Court to instruct you as to the law governing the case, and you must take such instructions of the Court to be the law. You will consider such instructions as a whole and will not select any one of them and place undue emphasis on that one instruction.

You will consider all the evidence admitted by the Court and now before you, and you will disregard all evidence and exhibits offered but not admitted by the Court, and all evidence stricken by the Court.

In this connection you are instructed that you are not called upon to pass upon objections and exceptions made or taken by counsel and you should not allow the making of objections and the taking of exceptions by counsel to influence or confuse you.

In your deliberations and in reaching a verdict you should act only upon the evidence which has been admitted and the law as it has been given to you by the Court.

Statements, if any, by counsel or the Court, unsupported by your own recollection of the evidence,

you will disregard. Likewise, you will disregard all statements made by counsel and the Court to each other [94] during the trial.

While it would be proper for me as the trial judge to analyze the testimony and to give you my understanding of it, which, however, would not be binding upon you, my purpose is not to intimate to you any opinion I may have of any fact or the weight of any evidence, and if I refer or have referred to any facts in the case, it will not be and has not been for the purpose of indicating any opinion I may have of the facts, but simply to illustrate some proposition of law which is involved with the facts.

It is your duty as jurors to confer with each other freely and frankly about, and to discuss together honestly, the questions involved in this case for the purpose of agreeing, if you can honestly do so, upon a common verdict. In the end, however, the jury's verdict must be the verdict of each and all twelve of you. A verdict representing the opinions of any lesser number is not a lawful verdict. The law does not contemplate that any one of you will surrender his or her own individual opinion about the guilt or innocence of the defendant so long as such one of you personally has a reasonable doubt about the matter. Regardless of what the opinions of your fellow jurors may be, as long as you have a reasonable doubt about the guilt [95] of the defendant, if you have such reasonable doubt, it is your duty to vote for an acquittal.

It is not the function of the jury to determine the

kind or amount of punishment of a defendant found guilty by a jury. Under the law it is the duty of the Court unassisted by the jury to determine such punishment. It is for the jury only to decide the guilt or innocence of the defendant.

I might add this further thought to the jurors, by way of an explanation of the present status of the case and the attitude of counsel and the Court respecting means and measures of assisting the jury in the jury's work in this case. Counsel in the case on both sides have brought before the Court and jury all of the admissible evidence that they know of to properly enable the jury and the Court to perform their respective functions. The Court has fully instructed the jury on the law applicable to the case. It is not known to the attorneys or trial judge what more could be done to properly enable the jury to perform its duties. You now have all of the means necessary to a decision. In this Court, the instructions in written form are not sent to the jury room.

Also, written transcripts of the testimony orally stated from the witness stand will not be sent [96] to the jury room.

It is for the jury to remember the evidence and the Court's instructions.

The indictment in this case will be sent to the jury room with you merely to show the paper charge against the defendant, but is not to be considered as evidence. You will take with you to the jury room the exhibits in this case and this form of verdict which has been prepared by the clerks

for your convenience. The verdict is in the usual form. As to each count on which the defendant is being tried, before the word "guilty" is a blank space and you will write in that blank space, in each instance, the word "is" or the word "not" according as you find. It will require your entire number to agree upon your verdict, and when you have so agreed you will cause your verdict to be signed by your foreman, whom you will elect from among your number immediately upon retiring to the jury room, and return with your verdict into open court.

Counsel, have I overlooked anything?

Mr. Belcher: I think not, Your Honor.

Mr. Gemmill: No, Your Honor.

The Court: Are there any exceptions to be noted? If so, upon being so notified, the Court will excuse [97] the jury for that purpose as the rules provide.

Mr. Belcher: None so far as the government is concerned, Your Honor.

Mr. Gemmill: Defendant has no exceptions.

The Court: The bailiffs will come forward and be sworn.

(Bailiffs sworn.)

The Court: The jury will now retire to consider your verdict, being hereafter in the conduct of the bailiffs, and you will hereafter remain together at all times until discharged by the jury from further consideration of this case.

(Jury retires.)

(Alternate juror excused by Court.)

(At 12:40 o'clock p.m., Wednesday, October 18, 1950, trial proceedings concluded.) [98]

Certificate

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,
Official Court Reporter.

[Endorsed]: Filed November 28, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 of the United States Court of Appeals for the Ninth Circuit and Rule 39(b)(1) of the Federal Rules of Criminal Procedure, I am transmitting herewith all the original

papers in the file dealing with the above-entitled action, including the Court Reporter's Transcript of Proceedings at Trial and Plaintiff's Exhibits numbered 1 and 2 (being the only exhibits in said cause) together with copy of Journal entry of Nov. 9, 1950, and that said papers constitute the record on appeal from the Judgment and Sentence of the Court filed and entered October 30, 1950, to the United States Court of Appeals for the Ninth Circuit, to wit:

1. Indictment, filed July 13, 1950.
2. Praecipe, Govt., for subpoenas, filed 10-6-50. (Allen, et al).
3. Marshal's return on subpoenas, Daugherty and 1, filed October 10, 1950.
4. Marshal's Return on subpoenas, Allen and 2, filed 10/12/50.
5. Praecipe for subpoena, Govt., (Ruthman), filed 10/17/50.
6. Marshal's Return on subpoena, (Ruthman), filed 10/17/50.
7. Government's Requested Instructions, filed Oct. 17, 1950.
8. Verdict filed October 18, 1950.
9. Defendant's Motion for Acquittal and in the alternative for a New Trial, filed Oct. 20, 1950.
10. Letter, Clerk, Cook County Court, Chicago, re true name of defendant, filed Oct. 30, 1950.

11. Judgment, Sentence and Commitment, filed Oct. 30, 1950.

12. Notice of Appeal, filed Nov. 3, 1950.

13. Order Exonerating Bail, filed Nov. 3, 1950.

14. Copy of letter, Clerk to U. S. Attorney, transmitting copy of Notice of Appeal.

15. Copy of letter, Clerk of District Court to Clerk of Appellate Court transmitting duplicate notice of appeal and statement from docket entries.

16. Withdrawal of Will G. Beardslee as counsel for defendant, filed Nov. 4, 1950.

17. Notice of Appearance of J. Kalina as attorney for defendant, filed Nov. 4, 1950.

18. Bond of defendant on appeal (Gen. Cas. Co. of America, \$10,000.00), filed Nov. 4, 1950.

19. Motion of defendant for leave to depart jurisdiction for 90 days, filed Nov. 9, 1950.

19-A. Journal entry, denying motion for leave to depart jurisdiction.

20. Reporter's Transcript of Proceedings at Trial, filed 11/28/50.

21. Court Reporter's Transcript of proceedings on Imposition of Judgment and Sentence, filed Dec. 4, 1950.

I further certify that the costs, fees and charges incurred in my office on behalf of the appellant for preparation of the record on appeal in this cause are as follows:

Notice of Appeal.....\$5.00
and that said amount has been paid to me by the
attorney for the appellant.

In Witness Whereof I have hereunto set my hand
and affixed the official seal of said District Court at
Seattle, this 6th day of December, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGER,
Chief Deputy.

[Title of District Court and Cause.]

ORDER REVOKING BOND ON APPEAL AND
REMANDING DEFENDANT TO MAR-
SHAL'S CUSTODY AND GRANTING DE-
FENDANT'S MOTION

This cause having this day come on regularly for
hearing in open court pursuant to due notice to
defendant upon the Court's previous oral order
requiring defendant to show cause if any there be
why his supersedeas bond on appeal should not be
revoked and why defendant should not be remanded
to the Marshal's custody without bond pending his
appeal to the U. S. Circuit Court of Appeals for
the Ninth Circuit and why he should not be ad-
judged in contempt of this Court because he had
left the jurisdiction of this Court and had gone to
San Francisco contrary to the Court's order and the
conditions of his bond;

And this cause having also come on for hearing upon defendant's own motion that he be remanded to the Marshal and be allowed credit on his sentence for the time spent in the Marshal's custody, and at McNeil Island and that his supersedeas appeal bond be surrendered and the surety thereon be discharged and exonerated, without prejudice to his appeal.

And the Court being of the opinion and finding and deciding that no reason has been shown why defendant's said appeal bond should not be revoked nor why defendant should not be remanded to the Marshal's custody pending defendant's appeal and that deft. has wrongfully departed the Court's jurisdiction and has gone to San Francisco for an unlawful purpose contrary to the Court's order and contrary to the conditions of said appeal bond;

Now, therefore, it is hereby

Ordered, Adjudged and Decreed that the defendant's supersedeas appeal bond and the previous order of the Court admitting defendant to bond or bail pending his appeal be and are hereby revoked and defendant is hereby remanded to the Marshal's custody without bond pending defendant's appeal; and it is further

Ordered, Adjudged and Decreed that defendant's motion that he be remanded to the Marshal's custody and be sent to McNeil Island pending his appeal and be allowed credit on his sentence for the time hereafter spent in the Marshal's custody and at McNeil Island and that his supersedeas appeal bond be surrendered and the surety thereon be discharged and exonerated, without prejudice to his appeal, be and

is hereby granted, and pursuant to his said motion defendant is hereby remanded to the Marshal's custody and defendant's said appeal bond is surrendered and the surety thereon is discharged and exonerated, without prejudice to his appeal, and upon defendant's request the Marshal may transfer defendant to McNeil Island Penitentiary forthwith.

It is further ordered that the show cause order previously orally made by the Court requiring defendant to show cause why he should not be adjudged in contempt of this Court be and is vacated and the rule thereunder is Discharged.

Done in open court this 22nd day of December, 1950.

JOHN C. BOWEN,
U. S. District Judge.

[Endorsed]: Filed December 21, 1950.

[Endorsed]: No. 12795. United States Court of Appeals for the Ninth Circuit. Ali Raschid, named in the indictment as Rudolph LaMarr, Appellant vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 27, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12795

UNITED STATES OF AMERICA,

Respondents,

vs.

ALI RASHID, named in the Indictment as
RUDOLPH LaMARR,

Appellant.

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

Comes now the appellant and presents a statement of the points upon which he intends to rely upon the appeal of the above-entitled cause.

Introduction

Ali Rashid, named in the Indictment as Rudolph LaMarr, was duly indicted on two counts in the United States District Court, Western Division of Washington, Northern Division. The First Count charged in substance, "the Grand Jury charges that on and about May 15, 1950, defendant, Rudolph LaMarr, who stated at his arraignment that his true and correct name is Ali Rashid, did knowingly and unlawfully persuade, induce and entice Enola McMath, a female, who had not attained her 18th birthday, to go from Seattle in the Northern Division of the Western District of Washington by common carrier to Portland, in the state of Oregon, with the

intent on the part of the defendant, Rudolph LaMarr, that she, the said Enola McMath be induced to engage in prostitution and debauchery."

Count Two charged in substance, "That on and about May 15, 1950, the defendant, Rudolph LaMarr, who stated at the time of his arraignment that his true and correct name is Ali Rashid, did knowingly and unlawfully persuade, induce and entice Beverly June Allen, a female person, to go from Seattle in the Northern Division of the Western District of Washington, to Portland in the State of Oregon, with the intent on the part of said defendant, Rudolph LaMarr, that the said Beverly June Allen should engage in the practice of prostitution and debauchery, and the said defendant, Rudolph LaMarr did thereby knowingly cause said Beverly June Allen to go and to be transported as a passenger upon the line and route of a common carrier in interstate commerce from Seattle, Washington, to Portland, Oregon."

The cause was duly tried in Seattle on October 17, 1950, and on October 18, 1950, the jury returned a verdict, "Guilty on both Counts."

On October 31, 1950, appellant duly filed and presented his motion for acquittal and in the alternative for a new trial. The motions were denied.

Appellant was duly sentenced to confinement in the United States Penitentiary at McNeil Island for a period of five years, and to a fine in the sum of \$1,000.00 on Count One, and to the same custody for the same length of time on Count Two, the execution of sentence as to Count Two to run con-

currently with execution of sentence in respect to Count One. Error was committed by the District Court of the United States of America for the Western District of Washington, Northern Division, in the respects hereinafter set forth.

I.

The District Court erred in denying the motion of appellant for a directed verdict of not guilty at the close of the government's case.

II.

The District Court erred in not sustaining the challenge of appellant to the legal sufficiency of the government's evidence to sustain the charge on both counts of the indictment.

III.

The District Court erred in denying appellant's motion for dismissal at the close of the government's case.

IV.

The District Court erred in denying appellant's motion for a new trial on the ground that defendant was substantially prejudiced and deprived of a fair trial by reason of the fact that the attorney for the government in his argument to the jury called the jury's attention to the fact that defendant had not taken the stand in his own behalf.

V.

The District Court erred in denying appellant's motion for a new trial on the ground that the verdict was contrary to the weight of the evidence.

VI.

The District Court erred in denying appellant's motion for a new trial on the ground that the verdict was not supported by substantial evidence.

VII.

The District Court erred in permitting the witness, Beverly June Allen, to testify to conversations had with appellant on the Friday prior to the trial over appellant's objection.

VIII.

The District Court erred in permitting the District Attorney to commit prejudicial error by repeatedly calling the jury's attention to the race of appellant without cautioning the District Attorney as to such prejudicial statements.

MILLER & SINCLAIR and
JACOB KALINA,

By /s/ LOREN MILLER,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 27, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To Paul P. O'Brien, Clerk of the United States
Court of Appeals for the Ninth Circuit:

Will You Please Take Notice, that Ali Rashid, named in the indictment as Rudolph LaMarr, appellant in the above-entitled action, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain judgment, and the whole thereof, and from that decision denying his motion for acquittal, and in the alternative for a new trial, of the United States District Court for the Western District of Washington, Northern Division, and the appellant, Ali Rashid, named in the indictment as Rudolph LaMarr, hereby requests and designates that there shall be made up and printed on this appeal the entire record of all proceedings and all matters related to the above-entitled cause, including the indictment, the proceedings had upon selection of a trial jury, the Reporter's transcript, the instructions of the Court, the arguments of counsel, the motion for acquittal and in the alternative for a new trial, excluding, however, the proceedings had upon the sentencing of appellant.

MILLER & SINCLAIR and
JACOB KALINA,

By /s/ LOREN MILLER,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 27, 1950.

No. 12795

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALI RASCHID, named in the Indictment as RUDOLPH
LA MARR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

MILLER & SINCLAIR,
LOREN MILLER and
HAROLD J. SINCLAIR,
407 Stimson Building,
129 West Third Street,
Los Angeles 13, California,
Attorneys for Appellant.

JACOB S. KALINA,
Seattle, Washington,
Of Counsel.

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No. 12795

IN THE

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FOR THE NINTH CIRCUIT

ALI RASCHID, named in the Indictment as RUDOLPH
LA MARR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

THE PLEADINGS.

Appellant Ali Raschid,¹ who was named in the indictment as Rudolph La Marr, was indicted in the United States District Court, District of Washington, Northern Division, in an indictment filed July 13, 1950 [R. pp. 3 and 4] charging him in two counts with violations of Section 2423, Title 18, U. S. C., and Section 2422, Title 18, U. S. C. [R. pp. 3, 4]. In Count I, it was charged in substance that he did knowingly and unlawfully, per-

¹Appellant had obtained an appropriate decree in the Supreme Court of Cook County, Illinois, changing his name [R. p. 13].

suade, induce and entice one Enola McMath, a female under 18, to go by common carrier from Seattle, Washington, to Portland, Oregon, with the intent that she be induced to engage in prostitution and debauchery in the latter city [R. p. 3]. In Count II it was charged that he did knowingly and unlawfully persuade, induce and entice Beverly June Allen, a female, to go by common carrier from Seattle, Washington, to Portland, Oregon, with the intent that she be induced to engage in the practice of prostitution and debauchery in the latter city [R. pp. 3, 4].

Issue was joined on a plea of not guilty to both counts and the cause was tried to a jury, before the Honorable John C. Bowen, District Judge, in the above mentioned district, on October 17 and 18, 1950 [R. p. 23]. The cause was tried on October 17 and 18, 1950, and on October 18, 1950, the jury returned its verdict of guilty on both counts [R. p. 10]. Judgment of conviction and sentence was signed and entered on October 30, 1950, sentencing Appellant to serve five years on each count, sentences to run concurrently and to pay a fine of one thousand dollars on Count I [R. pp. 14, 15].

On November 3, 1950, Appellant filed notice of appeal [R. pp. 16, 17]. On December 27, 1950, Appellant filed his Designation of Points on Appeal [R. pp. 126-129] and on December 27, 1950, filed his Designation of Contents of Record on Appeal [R. p. 130].

The Government requested instructions [R. pp. 4-9]; the record discloses no request for instructions by Appellant and the Court gave the instructions as set forth in R. pp. 102-119, to which no exceptions were noted

[R. p. 119]. (As will be noted hereafter, Appellant makes no claim of error predicated on the instructions.)

At the close of the government's case, Appellant by oral motion made in open court challenged the legal sufficiency of the government's evidence to sustain the charge on either count, moved for a dismissal, or in the alternative requested a directed verdict of not guilty [R. p. 77]. The challenge was overruled and the motion for directed verdict and for dismissal was denied as to both counts [R. p. 81]. Exception was taken and allowed to the rulings [R. p. 82]. Appellant thereupon rested and renewed his motions as of the close of the trial [R. p. 82, 83]. Exception was duly taken and allowed [R. p. 83].

On October 20, 1950, Appellant filed his Motion for Acquittal and in the Alternative for a New Trial [R. pp. 11, 12]. The Motion was denied as to each request and an order setting forth such denial was signed and entered on October 30, 1951 [R. p. 17].

THE FACTS.

Enola McMath, the female involved in Count I, testified in direct examination that she was sixteen years old in May, 1950, had been married and was the mother of a nineteen months old child at the time of the trial [R. p. 29]. She met Appellant at a night club in Seattle through an introduction by her sister Beverly June Allen (the female involved in Count II) in April or May of 1950 [R. p. 29]. She was planning on changing her job and was told by Appellant that there was more work in Portland [R. p. 31]. Appellant "didn't mention any purpose" for their going to Portland, "just that he thought we would like it down there" [R. p. 31]. Appellant made

arrangements to meet Enola McMath "in the train depot" and gave her and her sister money for her train fare to Portland the next day after the conversation [R. p. 32]. He gave them the name of two hotels at which they could stop in Portland; they chose the Carroll Hotel [R. p. 32] and hotel records showed they registered at the hotel on May 25, 1950 [R. p. 25], Mrs. McMath as Germain Pica. Appellant did not contact Mrs. McMath in Portland but she contacted him and, with her sister, met him at McCleod's Club [R. p. 34]. Appellant was told "where we were staying . . . We didn't do anything. We sat there and talked with him and that was about all" [R. p. 34]. On a subsequent evening she again met Appellant, with her sister, at the same club and "we were talking about working and he asked us if we had looked for any jobs. We had looked for a couple and something had come up where they had been taken, and we hadn't found any, and he asked us if we had enough money and at that time we had enough. . . ." [R. p. 35]. Subsequently she met Appellant at Rowland Hotel and "the thing that occurred, we had sexual intercourse" [R. p. 36]. She had sexual relations with Appellant because she was "afraid" [R. p. 37 and she was "afraid" because "before the time I left Seattle, he had called the house and wanted to see me. He said that he would come down to work and pick me up, that he wanted to talk to me, and I said no, that I didn't want to see him. He said that if I had any plans to see anyone else or had made plans, just to forget about them, and if I didn't see him he would come in and make a scene and drag me out of there. He didn't mean bodily, I don't imagine, but I thought he would create a scene, so I didn't go back to work that day" [R. p. 38]. Appellant had sexual intercourse with her "just this one occa-

sion at the Rowland Hotel that afternoon, and the second occasion was one evening after we had been to the club, we went there" [R. p. 38]. She asked Appellant for some money when she was "leaving for Seattle and I had asked Rudy for some money. I had told him I needed some money and he had given it to me" [R. p. 38]. He gave her \$70.00 [R. p. 38].

On cross-examination, she testified that "he hadn't ever threatened me bodily, with bodily harm, down at the club when I saw him there" [R. p. 43] and referred to the telephone conversation as the only "threat" ever made [R. p. 43]. She wasn't afraid of him at the time she went to Portland [R. p. 43]. The "main reason for borrowing (the money). I told him I had to come back to pay my baby's board and a few other things I had to pay" [R. p. 44]. Appellant never went to her hotel to see her [R. p. 45]. She never gave Appellant any money [R. p. 48] and she told Appellant she wanted to go to Portland to engage in legitimate work [R. p. 47]. She never suggested that she wanted to engage in prostitution and there is no testimony, direct or indirect, that Appellant ever suggested or talked about prostitution with her.

Beverly June Allen, the female, involved in Count II, testified on direct examination that she was nineteen years old at the time of trial and that she met Appellant at the Sessions Club in Seattle [R. p. 51]. She saw him at the same club a month or so later and "he just wanted to know if I wanted to become a prostitute" [R. p. 53] and she answered "No" [R. p. 53]; that she had no conversation prior to going to Portland about prostitution [R. p. 53]. "Well, we were just going up there to look for work" [R. p. 54]. She stayed at Carroll Hotel in Portland with her sister [R. p. 55] after the

Appellant and she had ridden on the same train but in different coaches to Portland at the suggestion of Appellant [R. p. 54]. She saw Appellant at McLeod's Club in Portland but there was no significant conversation [R. p. 56]. That some time in June she saw Appellant at his quarters in Portland and "Well, he just wanted to know if I wanted to become a prostitute" [R. p. 57]; that she said "No" and did not become a prostitute [R. p. 57].

After direct examination had closed the District Attorney sought and was granted permission to re-open his inquiry on the ground that he had further testimony to elicit. The following occurred [R. pp. 58, 59]:

"By Mr. Belcher:

Q. Directing your attention to last Friday, the month of October, did you see the defendant? A. Friday? No.

Q. Did you see him at any time prior to this trial? A. I saw him Sunday night.

Q. Where?

Mr. Beardslee: That is objected to as immaterial, if Your Honor plea.

The Court: What is the purpose?

Mr. Belcher: The purpose is to show the conversation that he had with her concerning this trial.

The Court: The objection is overruled.

Q. Did you have a conversation with the defendant at that time? A. Yes.

Q. What did he say to you? A. Well, he was talking about the trial and he was in a round about way trying to tell me how I would tell—

Mr. Beardslee: Just a minute, a round about way, he was trying to, I think the witness should be confined.

The Court: The objection is sustained. It is permissible for you to say in substance that he said. If you can recall his words, you should state his words. If you cannot recall the exact words, it is permissible for you to state the substance of what he said.

The Witness: Well, he was telling me how I could—well, I don't know how to put the words.

Q. In substance what did he say to you? A. Well, to deny everything I had said before.

Q. Did you tell him that you had been interviewed by special agents of the Federal Bureau of Investigation? A. No.

Q. What was it he wanted you to deny? A. He didn't want me to—he was just bringing it up, I mean.

Q. What? A. He was trying to tell me if I—
Mr. Beardslee: If Your Honor please—

The Court: You will have to say what he said or the substance and effect of what he said, if you say anything with reference to the conversation. Read the last question.

The Witness: Everything that I have said before—

Q. To whom? A. To the F. B. I. man.

Q. What else did he say? A. That's all.

Mr. Belcher: You may inquire.

By Mr. Beardslee:

Q. Did he accuse you of having been lying? A. No.

Q. Didn't he say you had lied about him? A. He just told me he didn't want me to lie."

On cross-examination, Beverly June Allen testified that she had been married, was divorced and the mother of a twenty two months old child [R. p. 61]; that she was not employed. She told Appellant she was going to Portland to look for "legitimate work" [R. p. 62] and that she didn't look for work as a prostitute in Portland [R. p. 62]. She introduced her sister to Appellant [R. p. 63] and that Appellant asked her and her sister if they had been trying to find legitimate work in Portland [R. p. 65].

Mrs. Rose Ferguson testified that she was the mother of the girls; that she had conversations with Appellant as to where they were and that he told her if he found them he would send them home [R. pp. 71, 72, 73].

Carrie L. Ruthman, proprietor of the Carroll Hotel, testified that Appellant had talked to her "several days" after the girls left her hotel (because of her objection to their drinking beer in a man guest's room), and told her their mother was seeking them [R. pp. 69, 70].

George D. Daugherty testified that he was assistant manager of the Hotel Washington, Portland; that the two complaining witnesses registered at his hotel on June 1, 1950, and that about June 8, 9, or 10—three to five days after they left—Appellant made inquiries about them on behalf of their mother [R. pp. 74, 75, 76].

All witnesses were produced by the Government.

Appellant offered no testimony on his own behalf.

The evidence has been set forth at what may be regarded as unseemly length because, as will appear, one of the critical questions here is whether there was substantial evidence to justify the conviction and whether the Court erred in denying motions for acquittal.

Abstract of Statement of Case Presenting the Questions Involved and the Manner in Which They Are Raised.

I.

As appears from the statement of pleadings and facts, support for the verdict on Count I must be found in the testimony of Enola McMath herself who testified positively that Appellant never mentioned prostitution to her either in Seattle or Portland. There is absolutely no evidence as to any sexual relations, or mention of sexual relations, by Appellant in Seattle. She did testify as to one, possibly two, sexual episodes in Portland after she had sought out Appellant. She gave him no money and he voluntarily gave her money to return to Seattle when she made the request in Portland. Appellant will show that the District Court erred in denying motions for acquittal, for a directed verdict and the challenge as to the sufficiency of the evidence under the First, Second and Third Specifications of Error [R. p. 128] as to Count I of the indictment.

For the reasons of the insufficiency of the evidence as set forth in the preceding paragraph, Appellant will show that the District Court erred in denying Appellant's motion for a new trial as set forth in the Fifth and Sixth Specifications of Error [R. pp. 128, 129].

As appears from the statement of pleadings and facts, support for the verdict as to Count II must be found in the testimony of Beverly June Allen who testified positively that she had never had any sexual relations with

Appellant. The record is silent as to any hint that he ever sought sexual relations with her either in Portland or Seattle, or that he ever sought or solicited her to have sexual relations with any other person at any specified place or time. The only testimony even tending to connect him with the crime charged is that he asked her, once in Seattle and once in Portland, if she wanted to become a prostitute. There is no testimony, either direct or indirect, that he ever gave her, or solicited from her, any money or funds on any occasion. Appellant will show that the District Court erred in denying motions for acquittal, for a directed verdict and the challenge as to the sufficiency of the evidence under the First, Second and Third Specifications of Error [R. p. 128] as to Count II of the indictment.

For the reasons of the insufficiency of the evidence as set forth in the preceding paragraph, Appellant will show that the District Court erred in denying Appellant's motion for a new trial as set forth in the Fifth and Sixth Specifications of Error [R. pp. 128, 129].

Obviously, the questions involved in the First, Second, Third, Fifth and Sixth Specifications of Error are inter-related, both as to Counts I and II, and will be considered under the general proposition of: *Insufficiency of the Evidence.*

II.

The same question pertains to both Counts under the Fourth Specification of Error [R. p. 128]. Both Counts will be considered together under the head of Misconduct

of the District Attorney. The District Attorney's argument is found on pages 84 to 90 and from pages 100 to 102 of the Record. The Fourth Specification of Error sets forth that Appellant was deprived of a fair trial by reason of the District Attorney's comment on the failure of Appellant to take the witness stand. In his argument, the District Attorney made these references to the matter:

The undisputed evidence is that prior to the transportation the defendant himself told them the hotel at which they should register [R. p. 87].

The girl has told you that she did not engage in prostitution either here in the City of Seattle or in the State of Oregon but there is no evidence to contradict or controvert her statement that that proposition was made to her in the City of Seattle and again made to her after she arrived in Portland at his expense. I don't know what further evidence any jury requires in this type of case [R. pp. 88, 89].

Is there anything here to refute the story of these girls [R. p. 89]?

He is not known as a philanthropist, at least, there is no testimony here to that effect [R. p. 101].

They don't deny in this record that he paid the transportation. That in itself, coupled with the other facts, shows what his intent was, and I say that a person is very gullible who cannot conclude that that was the intent of this defendant in this case [R. p. 101].

No objection was made and no exception was taken to any of these statements by Appellant's counsel but we will show that, in the context of this case, prejudicial error nonetheless resulted of which this Court should take cognizance.

III.

The evidence admitted which forms the basis of the claim of error under the Seventh Specification of Error has heretofore been set forth on page of this brief. Appellant will show that this evidence was immaterial, under the theory set forth by the Government, and that, in the context of this case, it was inflammatory and calculated to result in serious prejudice to the Appellant. This point will be considered under the heading: *Admission of Evidence Claimed Prejudicial*.

No specific claim of error will be advanced as to the Eighth Specification of Error—but Appellant will comment on statement of the District Attorney in his argument to the jury that “no man, white or black, is giving a woman \$105—unless he expects something in return” [R. p. 100] in connection with the racial undercurrents in this case and in reference to the whole question of the fairness of the trial.

SPECIFICATION OF ERRORS RELIED UPON.

I.

The Insufficiency of the Evidence.

(A) The District Court erred in denying Appellant's Motion for a Directed Verdict and for a verdict of Acquittal at the close of the Government's case and at the close of the case in full. Appellant's motion, urged as to both Counts, as the close of the Government's case is found on pages 77, 78 and 79 of the Record, and the Court's denial of the motion is found on page 81 of the Record. The motion was renewed at the close of the case as shown on page 83 of the Record.

(B) The District Court erred in denying Appellant's Motion for a New Trial or in the Alternative for Acquittal. Appellant's motion was made as to both Counts and is found on page 11 of the Record.

II.

Misconduct of the District Attorney.

Claimed misconduct of the District Attorney will be based on statements heretofore set out in *hæc verba* in the Abstract of the Case and are found on pages 87, 88, 89, and 101 of the Record.

III.

Admission of Evidence Claimed Prejudicial.

Error will be shown in admission of evidence as to a purported conversation of Beverly June Allen after the alleged crime and prior to the trial of this cause. The substance of the evidence admitted was that Appellant talked to the witness about the trial, that he had asked her to testify in a particular manner, first referred to by

the witness as “to deny everything that I had said before” and later “He just told me he didn’t want me to lie.” Objection was made that the evidence as to what was said “prior to this trial” was immaterial [R. p. 58]. The objection was overruled upon the District Attorney’s representation that “The purpose is to show the conversation that he had with her concerning this trial” [R. p. 58]. The full testimony elicited is found on pages 58, 59 and 60 of the record and is set forth in this Brief in full on pages 6 and 7.

ARGUMENT OF THE CASE.

Summary.

Justification for conviction under the White Slave Act, as charged here, must rest upon proof that the intent was conceived *before* the journey was undertaken. In this type of case, as in all criminal prosecutions, the burden rests on the Government to prove its case beyond a reasonable doubt and the question of guilt or innocence should not be left to conjecture or surmise. By proper motions, seasonably made, Appellant requested the Court to instruct the jury to acquit [R. pp. 77, 78, 79] and by renewal of that motion after the case had closed [R. p. 83] preserved the right to move for acquittal or in the alternative for a new trial after the verdict. He did move for such acquittal or alternatively for a new trial [R. p. 11] and in each instance the motions were denied. Unless there was substantial evidence of facts which excluded every hypothesis but that of guilt it was the duty of the trial judge to instruct the jury to return a verdict

for the accused. Clearly, the facts in this case could not and did not, by any construction, exclude every hypothesis but that of guilt. In truth, those facts were as clearly compatible with innocence as with guilt. There is absolutely nothing in the record to prove, or that tends to prove, that any criminal intent was formed as to Counts I or II and there is a total lack of any evidence of inducement, persuasion or enticement to undertake the journey under either Count.

Comment on the failure of the Appellant to testify in this case was particularly harmful in view of the closeness of the questions involved. The comments that were made were made after a conference in the Court's chambers in which both counsel participated. In light of that conference, counsel for Appellant forebore to make any remarks on the subject, or to try to explain why Appellant did not take the stand. The fact that the references that there were made by the District Attorney were indirect does not cure their vice. In the context of this case references to the failure to "anything to refute the story of these girls"; "he is not a philanthropist," at least, there is no testimony to that effect and "they don't deny in this record that he paid the transportation" could be understood by the jury as only references to the failure of the Appellant to take the witness stand. As we will show, indirect references to failure to testify are forbidden and the reviewing Court must look at the whole record to determine the effect of particular claimed errors.

It is hard to understand the theory under which the Court admitted conversation allegedly had between Appel-

lant and the witness Beverly June Allen, "prior to the trial." If they were intended as admissions or confessions of guilt they fell far short of the mark. The whole matter finally wound up as a farce when the witness testified that Appellant "Just told me he didn't want me to lie" but before she had given that testimony she had (either through or ineptness or with an intent to convey an attempt to induce her to change her testimony) tried to give off the impression that she had been asked to change her testimony. Here again, the error may seem trivial but in this case, where the issues were close, it could do inestimable damage to Appellant.

The record does not disclose it but Appellant here is a Negro. The complaining witnesses were white persons. All of us are aware of the deep seated prejudices that lurk beneath the surface where interracial sexual relations are involved, particularly between Negro males and white females. The District Attorney lost no time in seeking to have the complaining witness identify the club where the parties met as a "colored club" [R. p. 30]. He moved quickly to ask a leading question as to another club "It is the Colored Elks Club?" [R. p. 31.] In his argument to the jury, the District Attorney remarked that "no man, white or black, is giving a woman \$105" [R. p. 100]. Admittedly, there is no specific error to which Appellant can point in this latter aspect of the case. It is but one of the circumstances that the Court must look into in determining whether Appellant had that fair trial to which he is entitled, no matter what view is taken of his conduct.

I.

Argument as to Insufficiency of Evidence.

The law in this type of case is not obscure. It is epitomized in the following holdings:

“That the journey from one state to another is followed by illicit intercourse does not result in violation of the White Slave Traffic Act, where the journey was made for wholly different reasons . . . Intent is essential to violation . . .

“To justify conviction there should be *convincing evidence of the intention to transport the woman for immoral purposes and that it was formed before the woman reached the state to which she was transported*. If the intention referred to did not exist before the woman reached the state to which she was being transported, but was formed after reaching the state in which illicit relationship is had, conviction under the Act cannot be had.” (Italics ours.)

Alpert v. U. S., 12 F. 2d 352, 354.

“. . . It has been held that the transportation denounced must have for its *object*, or be a means of effecting or facilitating the sexual intercourse of the participants. If the *purpose* of the journey is not sexual intercourse, *though that be contemplated*, the statute is not violated.” (Italics ours.)

Harrison v. Hoff, 291 U. S. 559, 563.

“An intention that the women or girls shall engage in the conduct outlawed by Section 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. Without that

necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.”

Mortensen v. U. S., 332 U. S. 375.

And even the *Cleveland* case which is often pointed to as qualifying the rule in *Mortensen*:

“Guilt under the Mann Act turns on the *purpose which motivates the transportation*, . . .”

Cleveland v. U. S., 329 U. S. 14, 20.

The sufficiency of the evidence as to Count I must be weighed in the scales provided in this case. What evidence is there anywhere in record to show the existence of the critical intent formed before the journey was undertaken? Construed most favorably to the Government, as it must be, it shows absolutely nothing beyond one, or perhaps two, instances of sexual intercourse in Portland. The Government’s witness, Enola McMath, herself testified that the journey was undertaken to secure employment, and that she looked for employment in Portland. Certainly, it cannot be said that she was solicited in Seattle or in Portland to engage in prostitution.

The case must rest or fall on the fact that there were these one or two acts of sexual intercourse in Portland and that therefore she was persuaded, induced and enticed to go there for the purpose of “debauchery.” But where is the evidence of the intent to make the journey to embark on debauchery? The Court correctly instructed the jury that “the term debauchery as used in the indictment means that the woman in question is to be subjected repeatedly to unlawful sexual intercourse, fornication or adultery, or unlawful indulgence of lust” [R. p. 113]. The evidence shows that when the witness wished

to return to Seattle she solicited and was given funds by defendant to return to that city. That direct testimony negatives any suggestion or suspicion that she was to be subjected to "debauchery" as that term was defined by the Court or even if it was to be given that wider definition sought by the Government in its proposed instruction [R. p. 8] that it "means vicious indulgence in sensual pleasures, or excessive indulgence in sensual pleasures of any kind, gluttony, intemperance, sexual immorality, unlawful indulgence of lust." The evidence, showing at best two acts of sexual intercourse, coupled with a readiness to provide funds for her return to Seattle, does not prove the critical intent.

True enough, there was some testimony by Enola McMath that she entertained some fear of Appellant. That fear is made to turn on evidence so flimsy that it cannot be dignified as substantial. She denied any force or threats of force by Appellant and rested her case on a telephone conversation which she said caused her to stay away from work one day, apparently on the theory that his conduct might cause her some embarrassment [R. p. 37] through making a "scene" [R. p. 37].

This was the state of the record when Appellant's motions for a directed verdict and for acquittal were made, as to Count I. The Court's duty was to look at the record and:

"Unless there is substantial evidence of facts which exclude every hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all of the substantial evidence is as consistent with innocence as

with guilt it is the duty of the appellate court reverse a judgment against him.”

Hammond v. U. S., 127 F. 2d 752, 753.

A fair assessment of the state of the record when the motions were made compels the conclusion that there were absolutely no facts, let alone substantial facts, that excluded every hypothesis but that of guilt as to Count I. The trial court’s duty was plain; he should have instructed a verdict of not guilty.

Nor is the rule here contended for a vagrant announcement of one court. To the same effect see:

Gargotta v. U. S., 8 Cir. 1935, 77 F. 2d 977;

Nicola v. U. S., 3 Cir. 1933, 72 F. 2d 780;

Grant v. U. S., 3 Cir. 1931, 49 F. 2d 118;

Graceffo v. U. S., 3 Cir. 1936, 46 F. 2d 852;

Parnell v. U. S., 10 Cir. 1933, 64 F. 2d 324;

Leslie v. U. S., 10 Cir. 1930, 43 F. 2d 288;

Nosowitz v. U. S., 2 Cir. 1922, 282 Fed. 572.

And if it seems to cast a large burden on the prosecution it is well to remember that it is no more restrictive than the rule in civil cases that where:

“proven facts give equal support to each of two inconsistent inferences . . . neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recovery.”

Pa. R. R. v. Chamberlain, 288 U. S. 333, 330.

Here Appellant, clothed as he was with the presumption of innocence, was entitled to demand, as a matter of law, that before his case went to the jury the Government be required to produce facts excluding every other reasonable hypothesis but that of guilt. That the Government did not do. Judgment as a matter of law should have gone against it, burdened as it was with justifying the inference of guilt as against the presumption of innocence attached to Appellant.

The same issue as to insufficiency of the evidence had been preserved for the trial judge in light of the seasonable motions made by Appellant and that issue was presented by the Motion for Acquittal and in the Alternative for a New Trial, and is properly before this Court.

This Court will not, of course, weigh the evidence on this appeal. But:

“In an appellate Court, the question of the sufficiency of the evidence is a matter of law which calls for an examination of the record, not for the purpose of weighing conflicting evidence but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict.”

Hemphill v. U. S., 9 Cir., 120 F. 2d 115, 117.

Cf.:

May v. U. S., 175 F. 2d, 944.

Nor is this Court's duty diminished by the fact that the trial judge had denied a motion for a new trial.

“While the Circuit Court of Appeals accords weight to the rule that makes the jury the sole judges of the facts in criminal cases and the fact that the trial court did not set aside the verdict as contrary to the evidence the Court is nevertheless weighted with the responsibility of examining all the evidence to ascertain whether there is substantial proof of the defendant's guilt of the crime charged.”

Wise v. U. S., 108 F. 2d 379.

Appellant is mindful of the often stated rule that:

“A judgment of conviction must be affirmed, if, taking the view most favorable to the government, there is substantial evidence to support the verdict.”

Sipe v. U. S., 150 F. 2d 984.

But here the question is really a much narrowed one in which this Court is urged to determine the issue of whether there was any competent and substantial evidence which warranted the case in going to the jury. Under the law as set forth in *Hammond v. U. S.*, *supra*, it is the duty of this Court to reverse the judgment.²

No purpose would be served in repeating authorities just examined in making an argument in respect of

²The rule has been criticized by the Court announcing it in the *Hammond* case and some limitations suggested as to its applicability Cf. *Curley v. U. S.*, 160 F. 2d 229, 232.

Count II. If anything, the evidence upon which conviction rests in the latter Count is more flimsy than that proffered in respect of Count I. Admittedly, there were no sexual relations between Appellant and Beverly June Allen in Seattle or in Portland. The record is barren of any suggestion that any attempts were made at such intercourse. Similarly there is not the faintest evidence of any specific attempt by Appellant to persuade, induce or entice Mrs. Allen to engage in any act of sexual intercourse with any specific person, in Seattle or in Portland.

The Government's case, such as it is, must rest on the asserted inquiries made to her, before and after going to Portland, as to whether or not she "wanted" to be a prostitute. The witness testified that on each occasion she answered "No" as to such inquiries and there is no evidence that the matter, assuming it to have been broached, was ever pursued on any such occasion, or that any persuasion, inducement, or enticement was attempted. There is absolutely no evidence as to any inducement, enticement or persuasion for her to undertake the journey in interstate commerce. In light of the witness' negative answer to the initial inquiry, made in Seattle, as to the question as to whether she "wanted" to become a prostitute it is hard to see how any question of formation of the intent, critical to this prosecution, could have arisen for submission to the jury.

Tested by the applicable law, as heretofore set forth, there was *no evidence* that could possibly justify submitting the case to the jury.

II.

Argument as to Misconduct of District Attorney.

Comment on the failure of a defendant to take the witness stand is, of course, forbidden. And such comment is interdicted whether direct or indirect:

“Under Constitutional Amendments, and [applicable statutes] government’s counsel cannot comment on defendant’s failure to become a witness in his own behalf, even by indirect references.”

Rice v. U. S., 35 F. 2d 689.

That rule is qualified by the fact that such comment:

“. . . is only objectionable (when directed to) the failure of defendant personally to testify; and if at the close of the whole case any given point stands uncontradicted such lack of contradiction is a fact, upon which counsel are entirely at liberty to dwell.”

Lefkowitz v. U. S., 237 Fed. 664, 668.

And where comment is invited by the statements of defendant’s counsel, comment may be made by Government counsel.

There can be no claim in this case that Appellant’s counsel invited comment by his statements. He made none.

Admittedly the comments seem, on the surface, to come within the rule of *Lefkowitz v. U. S.*, *supra*. The District Attorney made the following references:

“The undisputed evidence is that prior to the transportation the defendant himself told them the hotel at which they should register” [R. p. 87].

“The girl has told you she did not engage in prostitution . . . but there is no evidence to contradict or controvert her statement that that proposition was made to her. I don’t know what further evidence any jury requires in this type of case” [R. pp. 88, 89].

“Is there anything here to refute the story of these girls?” [R. p. 89.]

“He is not a philanthropist, at least, there is no testimony to that effect” [R. p. 101].

“They don’t deny in this record that he paid the transportation. That in itself, coupled with other facts, shows what his intent was . . .” [R. p. 101].

The question as to whether a reference is indirect, or is a comment that any given fact or set of facts stands uncontradicted, or is a comment on the personal failure of the defendant to testify is, more often than not, a semantic one. It is a question that must be resolved in light of the facts and circumstances that surround each particular case. In this case where the comment was upon evidence that could be adduced only by personal testimony of the Appellant himself the references could have been understood, and no doubt were understood, only as comments on his personal failure to take the witness stand. Their subtlety does not rob them of their effect; in fact the effects is heightened because they were oblique. Moreover the question as to whether or not the unrebuked comment on failure to testify is a matter of moment in a given trial is one that depends on the closeness of

the issue and the atmosphere that surrounds the trial. Here, where the question was close and where latent racial attitudes might easily have crept into jury's consideration of the case, this Court should exercise more than a usual vigilance to test this kind of comment.

It is quite true that the Court instructed the jury that "you are to draw no inference of guilt against the defendant because he has not testified in his own behalf He is free to testify or not as a witness in his own behalf, but no presumption or inference of guilt is to be indulged by you from his failure to testify" [R. pp. 115-116]. However there is a wide difference in the induced attitude of the jury between a direct and instant statement to disregard a given remark and an admonition sandwiched in lengthy instructions. When the disregarding instruction is given by the Court as soon after utterance as possible it must have far greater psychological effect than a formal statement of law.

It is true, too, that no exception was taken at the time as to any of the statements now complained of. But this Court has it within its power to correct error notwithstanding failure of counsel to make seasonable objection.

See:

Vendetti v. U. S., 45 F. 2d 543.

"We have the right under our rules, should we choose to exercise it, to notice plain error, unassigned or unnoticed in the trial court, to prevent a miscarriage of justice in an exceptional case, where the error is particularly harmful."

Hemphill v. U. S., 9 Cir., 112 F. 2d 506, 507
(reversed on other grounds).

III.

Argument as to Admission of Evidence Claimed
Prejudicial.

After he had concluded direct examination of Beverly June Allen, complaining witness under Count II, the District Attorney asked to reopen his case and upon receiving permission asked the witness [R. p. 58]:

“Q. Directing your attention to last Friday, the month of October, did you see the defendant? A. Friday? No.

Q. Did you see him at any time prior to this trial? A. I saw him Sunday night.

Q. Where?”

At this point Appellant’s counsel interposed the objection that such questions were immaterial. Parenthetically, it must be observed here that the dates under scrutiny were subsequent to the commission of the alleged crimes and that on the surface inquiries regarding them were plainly immaterial. The Court, in response to the objection, inquired as to the purpose of the questions. The following then occurred:

“Mr. Belcher (District Attorney): The purpose is to show the conversation he had with her concerning this trial.

The Court: The objection is over ruled.”

Why or in what manner a conversation had between a defendant and a witness in a trial becomes material simply because it is had “concerning” the trial is puzzling. The objection as to materiality was not vitiated simply because a conversation was “had with her concerning this trial.” It might have been of the most trivial kind, concerned with time or place or other minor details. Pre-

sumably, the District Attorney, in his zeal to prosecute wanted to elicit a conversation inimical to the defendant. What he succeeded in doing, through permission of the Court to pursue the inquiry, was to draw from the witness confused and contradictory statements, apparently aimed at discrediting the defendant and certainly harmful to him. She said successively:

“Well, he was talking about the trial and in a around about way trying to tell me how I would tell—” [R. p. 58].

“Well, he was telling me how I could—well, I don’t know how to put the words” [R. p. 59].

“Well, to deny everything I had said before” [R. p. 59].

Then when asked:

“What was it he wanted you to deny? she said ‘He didn’t want me to—he was just bringing it up’ ” [R. p. 59].

And finally on cross-examination, the witness said:

“He just told me he didn’t want me to lie” [R. p. 60].

The admission of this immaterial testimony may seem a trivial thing in the course of a trial of this kind. But what was said must be seen in its proper perspective and against the background of the events that transpired at the trial. Plainly, the witness’ first answers were deliberately calculated to give the impression that Appellant had sought to induce her to change her testimony, that he had in fact suborned perjury. The Government’s whole case as to Count II revolved around statements made, or alleged to have been made, by Appellant to this

witness. Here she was permitted, to take a charitable view of the matter, to make statements on an immaterial issue tending to further discredit Appellant. Her final admission that “He just told me that he didn’t want me to lie” [R. p. 60] could hardly undo the mischief done on her direct examination into matters that could neither prove nor disprove any issue in the case, and that were utterly immaterial, unless they partook of the nature or admissions or confessions—something never claimed for them by the District Attorney.

Conclusion.

The complete testimony in this case is found between pages 23 and 76 of the printed record and counsel respectfully urge the Court to read it in its entirety in order to get the full flavor of the case. Such a reading will bear out our contention, we believe, that conviction here rests upon a foundation that does not square with the requirements of due process, a conviction that cannot be sustained in our view without doing violence to cherished principles of law, to the protection of which Appellant was entitled, no matter how reprehensible his conduct may have been in respect of matters irrelevant to this case.

The judgment should be reversed.

Respectively submitted,

MILLER & SINCLAIR,
LOREN MILLER and
HAROLD J. SINCLAIR,

Attorneys for Appellant.

JACOB S. KALINA,
Of Counsel.

No. 12795

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United States
Court of Appeals
FOR THE NINTH CIRCUIT

ALI RASCHID, named in the
indictment as Rudolph LaMarr,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
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NORTHERN DIVISION

BRIEF OF APPELLEE

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J. CHARLES DENNIS
United States Attorney

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HONORABLE JOHN C. BOWEN, *Judge*

STATEMENT OF THE CASE

Appellant, indicted by the grand jury as Rudolph LaMarr, for violation of the White Slave Traffic Act (Title 18, Sections 2423 and 2422), after a plea of not guilty to the two counts in the indictment, was tried and convicted on both counts and sentenced to five years' imprisonment and a \$1000.00 fine on Count I and five years' imprisonment on

Count II, to run concurrently with the sentence imposed on Count I.

The first count, in substance was that he did knowingly, and unlawfully, persuade, induce and entice one Enola McMath, a female, who had not attained her eighteenth birthday, to go by common carrier from Seattle, Washington, to Portland, Oregon, with intent on the part of appellant that the said Enola McMath be induced to engage in prostitution and debauchery.

The second count, in substance charges that appellant did knowingly and unlawfully persuade, induce and entice Beverly June Allen, a female person, to go from Seattle, Washington, to Portland, Oregon, with the intent on the part of appellant that the said Beverly June Allen should engage in the practice of prostitution and debauchery, and that appellant did thereby knowingly cause the said Beverly June Allen to go and to be transported as a passenger upon the line and route of a common carrier in interstate commerce from Seattle, Washington, to Portland, Oregon.

To this indictment, appellant pleaded not guilty and upon a trial before a jury he was found guilty on both counts.

Judgment and sentence was passed to October 30, 1950.

At the trial, the only evidence offered was on behalf of the Government, which consisted of the testimony of the two victims involved and two hotel operators at Portland, Oregon, where the two victims registered.

Appellant offered no evidence whatsoever, nor did he take the stand in his own defense. At the close of the Government's case, appellant interposed a motion challenging the sufficiency of the evidence, which was denied. (R. 11) Appellant offering no evidence, renewed his motion for a directed verdict of not guilty, which was likewise denied. (R. 11)

After the return of the verdict of the jury, appellant filed a written motion for acquittal and in the alternative for a new trial. (R. 11) This motion was likewise denied and October 30, 1950, judgment and sentence was imposed. (R. 15)

At the trial, appellant was represented by Will G. Beardslee, who, after the court had fixed bail at \$10,000.00 pending appeal, withdrew November 3, 1950, after giving written notice of appeal. (R. 17-19) The next day, November 4, 1950, J. Kalina, Esq., entered his appearance as attorney for appellant.

(R. 18) Los Angeles counsel appear in this court with J. Kalina, of Seattle, of counsel.

Appellant thereafter and on November 4, 1950, filed his appeal bond in the penal sum of \$10,000.00 with General Casualty Company of America as surety. (R. 19-20) A motion supported by the affidavit of appellant was filed seeking permission to leave the jurisdiction of the District Court, which was denied. (R. 22) Appellant, nevertheless did leave the jurisdiction, was apprehended in San Francisco, California, and returned to Seattle at the expense of his bondsman.

On December 22, 1950, the District Court made and entered the following order:

“This cause having this day come on regularly for hearing in open court pursuant to due notice to defendant, upon the Court’s previous oral order requiring defendant to show cause if any there be why his supersedeas bond on appeal should not be revoked and why defendant should not be remanded to the Marshal’s custody without bond pending his appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit and why he should not be adjudged in contempt of this Court because he had left the jurisdiction of this court and had gone to San Francisco, contrary to the Court’s order and the conditions of his bond. And this cause having also come on for hearing upon defendant’s own motion that he be remanded to the Marshal and be allowed credit on his sentence for the time spent in the Marshal’s custody, and at McNeil

Island, and that his supersedeas appeal bond be surrendered and the surety thereon be discharged and exonerated, without prejudice to his appeal.

“And the Court being of the opinion and finding and deciding that no reason has been shown why defendant’s said appeal bond should not be revoked nor why defendant should not be remand to the Marshal’s custody pending defendant’s appeal, and that defendant has wrongfully departed the Court’s jurisdiction and has gone to San Francisco for an unlawful purpose contrary to the Court’s order and contrary to the conditions of said appeal bond,

“Now, therefore, it is hereby

Ordered, Adjudged and Decreed that the defendant’s supersedeas appeal bond and the previous order of the court admitting defendant to bond or bail pending his appeal be, and are hereby, revoked and defendant is hereby remanded to the Marshal’s custody without bond, pending defendant’s appeal; and it is further

“Ordered, Adjudged and Decreed that defendant’s motion that he be remanded to the Marshal’s custody and be sent to McNeil Island pending his appeal and be allowed credit on his sentence for the time hereafter spent in the Marshal’s custody and at McNeil Island, and that his supersedeas appeal bond be surrendered and the surety thereon be discharged and exonerated, without prejudice to his appeal, be and is hereby granted and pursuant to his said motion, defendant is hereby remanded to the Marshal’s custody and defendant’s said appeal bond is surrendered and the surety thereon is discharged and exonerated, without prejudice to his appeal, and upon defendant’s request the Marshal may transfer defendant to McNeil Island Penitentiary forth-

with. It is further ordered that the show cause order previously orally made by the Court requiring defendant to show cause why he should not be adjudged in contempt of this Court be and is vacated and the rule thereunder discharged.

DONE IN OPEN COURT this 22d day of December, 1950.

JOHN C. BOWEN
U. S. District Judge" (R. 123-5)

THE EVIDENCE

The two victims, their mother and two hotel proprietors from Portland, Oregon, constituted all of the witnesses in the case.

Defendant did not take the stand in his own defense, neither did he offer any other witnesses. (R. 76)

The testimony of the two victims is short and concise and was sufficient, we claim to go to the jury.

It shows that the defendant, at Seattle, suggested to the victim in Count II that she would profit by engaging in prostitution; that with this in mind he paid her transportation and that of her sixteen-year-old sister to Portland; that he accompanied them to Portland and before leaving Seattle suggested the hotel at which they should stay.

The intent of the defendant is gathered from what he said and did.

At Portland he again propositioned the victim to engage in prostitution and debauched the younger one. This evidence is all set out in appellant's brief and it is needless to here repeat it.

ARGUMENT

INSUFFICIENCY OF THE EVIDENCE

The claim of insufficiency of the evidence to submit to the jury so elaborately argued by Los Angeles counsel who did not participate in the trial borders on the ridiculous, when it is considered that they have gone to great length in setting out part only of that evidence in their brief (eliminating, of course, what follows).

They say, for instance, that support for the verdict on Count I must be found in the testimony of Enola McMath herself, who they say positively testified that appellant never mentioned prostitution to her either in Seattle or Portland. So far as it goes, that statement concerning prostitution is correct, but the indictment charges not only inducement to engage in prostitution, but "debauchery" as well. Can it be said by any fair-minded person that under this girl's testimony, that appellant did not "debauch" her?

The testimony of this victim was that she first

met appellant at the Sessions Club in Seattle in May, 1950. (R. 30) That "it was weeks or so later my sister and I were at the Elks Club." "He had called us on the phone and said he wanted to talk to us and so we both went down, and it was then that he brought up the subject of going to Portland * * *." (R. 31)

Q. Then what followed?

A. Well, then after we decided to go, he told us to meet him the next day and that he would give us the money for the train fare, for the tickets. (R. 31)

Q. Did he give you the money for train fare?

A. Yes. (R. 32)

Q. Where?

A. It was in the train depot.

Q. What did you do with that money?

A. I took the money and bought Beverly and myself two tickets round trip, and then when I arrived in Portland, used the other part of the money for our hotel. (R. 32)

Q. What, if anything was said to you by the defendant at the station or at any other time as to where you should go or what you should do at Portland?

A. Before we left, he had told us that *after we had registered at the hotel, to call him.* (R. 32).

Q. What hotel? Did he suggest the name of the hotel?

A. He had given us, I believe it was two hotels to choose from. The Carroll was one and I don't remember the other, and we chose the Carroll. (R. 32)

Then follows what we claim definitely shows the intent of appellant so far as this victim is concerned, which intent, any reasonable minded person would conclude was formed in Seattle long prior to the interstate journey to Portland.

In the victim's explanation of her sexual relations with appellant at Portland, we find this in the record at pages 37-38:

The Witness: Well, the reason for having sexual intercourse was before I had gone to Portland that I didn't mention was that —

The Court: Never mind that. Do not state that. That is not the question. Read the question.

(The question referred to is contained at p. 36 of the record and was: Q. What were the circumstances under which you had sexual relations?)

The Court: Answer that and nothing else.

The Witness: I was afraid.

Q. Why? Was it something that he said?

A. Well, he had said something before that.

Q. What was it he said? (R. 37)

A. That is what I started to say *before the time*

that I had left Seattle, he had called the house and wanted to see me. He said that he would come down to work and pick me up, that he wanted to talk to me, and I said no, that I didn't want to see him. He said that if I had any plans to see anyone else or had made plans, just to forget about them, and if I didn't see him he would come in and make a scene and drag me out of there. He didn't mean bodily, I don't imagine, but I thought he would create a scene, so I didn't go to work that day. (R. 38)

The jury had the right to believe from this testimony that it was then that the appellant formed the intent to debauch this young girl. It was certainly a circumstance in the light of the accomplishment of that purpose at Portland.

We contend that far from being insufficient, it was conclusive, when corroborated, as it was, by the testimony of the hotel proprietor, Mrs. Carrie L. Ruthman, (R. 70) who testified that the girls registered at her hotel (R. 26) and who attributed to appellant the statement that "he was a friend of their mother, of the young girl's mother, and she was very anxious about her and *had sent him to Portland to find them and bring them home.*" (R. 70)

The mother of these victims was called on behalf of the Government (Mrs. Rose Ferguson (R. 71). She testified to the dates of the birth of her two daughters. She was asked if she was acquainted

with appellant and her answer was, "No, I have never seen the party, but I have talked with him over the telephone."

Q. What was the talk that he had with you?

A. He wanted to know where the girls were, and he was anxious to get hold of a suitcase that the girls had borrowed.

Q. Did you ever meet him at any time?

A. No. I did not. (R. 72)

On cross-examination by Mr. Beardslee, the following is shown by the record: (R. 72)

Q. Did you ever call the defendant in Portland to ask him about your girls, where they were?

A. No. I called Portland, the Carroll Hotel, to find out about the girls, and Mr. LaMarr had called me after that, wanting to know where the girls were. I did not call him but he had called me. I also called Portland myself, but the girls were not at the Carroll Hotel, and that is when I was beginning to worry. (R. 73)

As the record at this point stands, it clearly shows that the appellant lied to the proprietor of the Carroll Hotel when he said the mother of these two young girls had sent him to Portland to find her daughters, which is just another circumstance the jury were entitled to consider in making up their verdict.

On the second count, we have the undenied testimony of the victim that appellant solicited her in Seattle to engage in prostitution, and again in Portland, Oregon.

The fact that appellant did not accomplish his purpose is entirely beside the point.

Qualls v. United States, 149 F. (2d) 891.

The jury had the right to consider all of the surrounding circumstances and it is idle to argue that the Government must produce a photographic copy of appellant's mind to show his intent. Intent is usually determined by circumstances coupled with actions, and the jury in this case apparently added facts to circumstances as disclosed by the evidence and reached the conclusion that the facts and circumstances proved to their satisfaction beyond a reasonable doubt that defendant was guilty as charged in both counts.

ALLEGED INADMISSIBLE EVIDENCE

The argument of counsel on this question is so palpably without merit that it is not worthy of notice.

ALLEGED MISCONDUCT OF GOVERNMENT COUNSEL

Grasping at straws in their desperate effort to

this appellant, the old trick of claiming error prejudicial to appellant is here reflected again.

Apparently able counsel representing appellant at the trial, at the time of the argument of Government counsel, could discern nothing to complain about. No objection was at any time made to what was said in either opening or closing argument, and such assignment comes too late.

Contrary to showing "zeal" for the purpose of securing a conviction, as Los Angeles counsel characterize it, we believe Government counsel's argument was well within the limits set forth in the *Lefkowitz* case cited by counsel.

Certainly comment on the part of Government counsel was invited by Mr. Beardslee's argument to the jury, Los Angeles counsel's statement at p. 24 of their brief to the contrary notwithstanding.

All of the authorities cited by Los Angeles counsel for appellant state the law as applied to the situations there involved, but the facts in those cases are wholly dissimilar to the facts and circumstances as disclosed by the record in this case.

At the outset, and since appellant's present counsel say, at p. 16 of their brief, in connection with the claim of prejudice to appellant in the argument of

counsel for the Government (to which no exception was taken at the time):

"The record does not disclose it, but appellant here is a negro. The complaining witnesses were white persons. All of us are aware of the deep seated prejudices that lurk beneath the surface where interracial sexual relations are involved, particularly between negro males and white females." (Italics ours).

On the voir dire examination of the jury, this precise question was propounded to each juror separately *at the urgent request of Mr. Will Beardslee, appellant's trial counsel*, who later withdrew. (R. 18) We trust we too may be excused for going outside the record.

The question which the Court asked the jurors as a whole, as framed by Mr. Beardslee was in effect: *"Does any juror now in the jury box entertain any bias or prejudice against the defendant solely because he is a negro and two white girls are involved?"* Those entertaining such prejudice were requested to so indicate by raising their hands. Five such jurors raised their hands and were promptly excused for bias and their places were filled by five other jurors to whom a similar question was propounded and all twelve jurors, and the thirteenth alternate juror, each for himself and herself (the jury consisted of nine men and three women) swore that they entertained no

such prejudice and could give this negro just as fair a trial as if he were a white man.

Instead of Government counsel having inflamed the minds of the jurors, as argued by present counsel, where they say (Br. 16):

“The District Attorney lost no time in seeking to have the complaining witness identify the Club where the parties met as a colored club. (R. 30). He moved quickly to ask a leading question as to another club, ‘It is the colored Elks Club?’” (R. 31)

The actual record reads:

Q. What kind of a club is it?

A. It is a colored club. (R. 30)

As to the colored Elks Club testimony, we also quote the record verbatim.

Q. Did you meet him at some subsequent date?

A. Several. Well, it was weeks or so later that my sister and I were up at the Elks Club and it was then that —

Q. You say the Elks Club? Is that the Elks Club down here on —

A. Jackson.

Q. It is the colored Elks Club?

A. Yes.

The Court: Ask the witness Mr. Belcher.

The Witness: It was the colored Elks Club on Jackson Street.

Q. What was the occasion of your going down there?

A. Well, he had called us on the phone and said he wanted to talk to us and so we both went down, and it was then he brought the subject up of going to Portland. I was working at the time. I was working, that was it, and I was planning on changing my job and he had said there were more opportunities for work down there. (R. 30-31)

To all of which no objection was made.

The inquiry was pertinent and the answers direct and the whole matter was far from being an attempt to in anywise prejudice or influence the jury on a racial issue which the jurors solemnly swore would not in any event influence their verdict. The racial question had already been overly emphasized by Mr. Beardslee, trial counsel for appellant, and present counsel are not in any position to complain of a matter injected into the case by their predecessor.

Again counsel quote from a very small part of the argument of Government counsel in addressing the jury (Br. 16) where they say: "In his argument to the jury, the District Attorney remarked 'no man, white or black, is giving a woman \$105'." (R. 100)

In fairness, we believe what preceded and followed those quoted words should be mentioned. To again quote the record:

The Court: We will hear the Government's closing argument.

Mr. Belcher: If your honor please, it is not a question, as counsel suggested to you, as to who sought who in this case. These girls are not on trial. What may have been their intention is an entirely different thing than what was the intention of the defendant with his philanthropy. It stands to reason that no man, white or black, is giving a woman \$105 — that is what it was, \$35 and \$70 — unless he expects something in return.

It requires a rather biased mind to conclude, as do present counsel for appellant, that what was said by Government counsel in addressing the jury was intended to create racial prejudice and thus influence a jury whose membership constituted those on whose minds it had been so indelibly impressed by the then counsel for appellant that the defendant was a negro and the two victims were white girls, and each of which juror solemnly swore he or she entertained no prejudice against defendant on account of his color.

Again may we point to the argument of appellant's counsel to the jury at the trial, which invited these remarks by Government counsel. Mr. Beardslee, as appears in the record at p. 90, in addressing the jury said:

“The principal thing that worries me in this case is that I cannot help but feel that there may

be some latent prejudice against a colored man associating with white women, and by that I don't mean prejudice on its face, but it may be something latent that you are not conscious of until the actual facts are presented to you.

"With respect to that, I hope you will all consider who sought who in this case. The defendant *Rudy LaMarr was at a negro night club where negroes gather*. These girls, first the older one, came into the club, was introduced to him. She said she was with a party of other people
* * *."

Can it be said to be error for Government counsel to have said in reply:

"It stands to reason that no man, white or black, is going to give a woman \$105. * * * unless he expects something in return."

when the matter of defendant's color and that two white girls were involved was so paraded before the jury by appellant's own counsel?

It will be noted that at no time during the argument of Government counsel either in opening or closing did counsel for appellant raise any question as to the conduct of Government counsel.

After the Court had instructed the jury, this occurred: (R. 119)

The Court: Counsel have I overlooked anything?

Mr. Belcher: None, so far as the Government is concerned, your honor.

Mr. Gemmill: Defendant has no exceptions.

It appears in the record at p. 11, after the receipt and filing of the verdict of the jury, that is two days thereafter (October 20, 1950), appellant through his attorney Will G. Beardslee, filed in the District Court a paper denominated "motion for acquittal and in the alternative for a new trial", where for the first time, in that part of the alternative motion it is stated:

"4. The defendant was substantially prejudiced and deprived of a fair trial by reason of the fact that the attorney for the Government, in his argument to the jury, called the jury's attention that the defendant had not taken the stand in his own behalf by stating that certain evidence introduced by the Government had not been denied *by the said defendant.*"

This, of course, came too late, even if meritorious.

The record is absolutely barren of any reference by Government counsel to the fact that the defendant had not testified in his own defense.

The rule announced in *Lefkowitz v. United States*, 273 Fed. 664, is:

" * * * and if at the close of the whole case any given point stands uncontradicted, such lack of contradiction is a fact, an obvious truth, upon which counsel are entirely at liberty to dwell.

We perceive nothing objectionable on the part of the prosecution.”

Los Angeles counsel for appellant concede in their brief (p. 24):

“And where comment is invited by the statement of defendant’s counsel, comment may be made by Government counsel.”

Again Los Angeles counsel for appellant are wrong when they say (Br. p. 24):

“There can be no claim in this case that appellant’s counsel invited comment by his statement. He made none.”

In this connection it is only necessary to read the quoted argument of Mr. Beardslee set out at pages 17 and 18 hereof.

CONCLUSION

Dealing first with the question of the sufficiency of the evidence, this Court has said in *Womble v. United States*, 146 F. (2d) 263:

“On the question of the sufficiency of the evidence, this Court can inquire only as to whether there is substantial evidence to support the findings. * * * The appellant contends that there was no evidence that in transporting Dewel Kathleen Womble he had any intent that she should practice prostitution. *The law is settled that in prosecutions for violation of the White Slave Act, Title 18, U.S.C.A., Sec. 398, the jury or Court may infer intent from all the circum-*

stances of the evidence. Tedesco v. United States, 9 Cir. 118 F. (2d) 737, 741, *Shama v. United States*, 8 Cir. 94 F. (2d) 1. This Court has decided the evidence of conduct at the end of the journey is sufficient to sustain such a conviction. *Kelly v. United States*, 9 Cir. 297 F. 212.

“* * * It is our opinion that all this evidence is substantial and supports the lower court’s judgment.” (Italics ours)

The evidence we have here set out, we claim is also substantial and supports the lower court’s judgment.

On the question of the admission of evidence claimed prejudicial, it is a little difficult to understand where there could be the slightest error in having one of the victims testify to a conversation with the appellant shortly prior to the trial concerning the prospective trial and since Los Angeles counsel do not elucidate, we pass the matter without further comment.

Concerning the alleged misconduct of Government counsel in his argument to the jury, we feel we have fully covered that phase.

Los Angeles counsel have gone far afield in citing *Harrison v. Hoff* (should be *Hansen v. Haff*), 291 U. S. 559, 563. That was a deportation case where the statute involved prohibited the entry into the United States of “prostitutes or persons coming

into the United States for the purpose of prostitution or for any other immoral purpose.”

We believe had counsel taken the time to read the case, instead of lifting out of it a certain quoted portion, they would have found that what the Court there was considering was the “intent” of the *female* involved and *not the intent of the male*, as here.

In the case at bar, the intent of the females involved has no bearing on the case.

The case of *Cleveland v. United States*, 329 U. S. 14, definitely settles these principals:

1. The act is not limited to commercialized vice. Citing *Caminetti v. United States*, 242 U. S. 470, which originated in this Circuit.
2. It expressly applies to transportation for purposes of debauchery which may be motivated solely by lust.
3. Guilt under the Act, turns on the purpose which motivates the transportation, not on its accomplishment.

Under the first count, appellant accomplished his purpose by having the sexual relations at Portland, for which he laid his plans in Seattle, when he first formed his intent.

Under the second count, although forming the intent at Seattle, as disclosed by his suggesting pros-

titution to the victim prior to the commencement of the interstate journey, and renewing that suggestion after the interstate journey had ended, but which was not accomplished, so that, under the rules announced by the United States Supreme Court and adhered to in this Circuit, we respectfully submit there was no error committed in this case and the judgment should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

